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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-5458

EDWARD HORSLEY, Petitioner

v.

STATE OF ALABAMA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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INDEX

	Page:
Opinions Below	1
Jurisdiction	1
Questions presented	2
Constitutional and statutory provisions	2
Statement of the case	3
Reasons for granting the writ	6
I. Alabama's Unique Death Penalty Statute Which Precludes Juries in Capital Cases From Considering Lesser Included Offenses Deprives All Persons Accused of Capital Crimes of the Due Process Rights Guaranteed Them By the Fourteenth Amendment and Violates the Eighth Amendment Prohibition Against Cruel and Unusual Punishments	6
A. The Due Process Violation	8
B. The Eighth Amendment Violation	12
II. The Statutory Procedure Which Defers Consideration of Aggravating and Mitigating Circumstances Until After a Jury Has Imposed a Sentence of Death Places the Trial Judge in a Position of Having to Reduce a Jury-Fixed Death Sentence if He Feels the Death Penalty Is Inappropriate and Raises Substantial Questions Under the Due Process Clause and the Eighth Amendments	16
III. The Statutory Provisions Which Limit Circumstances That May Be Considered in Mitigation Are Akin to Those Condemned in Lockett v. Ohio	19
IV. Alabama Lacked Jurisdiction to Try Appellant For Aggravated Robbery. In That the Robbery Complained of Occurred in North Carolina	21
Conclusion	23
Appendices	
Appendix 1a (Opinion of the Alabama Supreme Court)	
Appendix 2a (Order of the Alabama Surpreme Court, Denying Rehearing)	
Appendix 3a (Opinion of the Alabama Supreme Court in Ex parte: Brian Keith Baldwin)	
Appendix 4a (Decision of the Alabama Court of Criminal Appeals)	
Appendix 5a (Alabama Death Penalty Act)	

CITATIONS

Cases:

Addington v. Texas, 25 Crim.L.Rptr. 3039 (May 2, 1979)	9
Boykin v. Alabama, 395 U.S. 238 (1969)	4
Coker v. Georgia, 433 U.S. 584 (1977)	13
Connally v. Georgia, 249 U.S. 245 (1977)	17
Dennis v. United States, 341 U.S. 494 (1951)	17
Evans v. State, 361 So.2d 666 (1978)	22
Ex parte Brian Keith Baldwin (see, Appendix 3a)	1, 5
Ex parte Recardo Cook (Re: Recardo Cook v. State of Alabama), SC 77-320 (Ala. Sup. Ct. Sept. 10, 1978)	20
Fulghum v. State, 277 So.2d 886 (1973)	8
Furman v. Georgia, 408 U.S. 238 (1972)	66, 10, 11, 12, 13, 17
Gardner v. Florida, 430 U.S. 349 (1977)	16, 17, 18
Gregg v. Georgia, 428 U.S. 153 (1976)	6, 10, 11, 14, 21
In re Winship, 397 U.S. 358 (1970)	9
Jacobs v. State, 361 So.2d 640 (1978)	4, 6, 10, 14, 15, 18, 20
Johnson v. Mississippi, 403 U.S. 212 (1971)	17
Jurek v. Texas, 428 U.S. 262 (1976)	6, 17
Keeble v. United States, 412 U.S. 205 (1973)	9, 11
Lambert v. State, 25 So.2d 180 (1972)	5
Lockett v. Ohio, 98 S.Ct. 2954 (1978)	15, 20, 21
Proffitt v. Florida, 428 U.S. 242 (1976)	6
Stanislaus Roberts v. Louisiana, 428 U.S. 325 (1976)	6, 15
Tumey v. Ohio, 273 U.S. 510 (1927)	17
Ward v. Village of Monroeville, 409 U.S. 57 (1972)	17
Wardius v. Oregon, 412 U.S. 470 (1973)	18
Witherspoon v. Illinios, 391 U.S. 510 (1968)	16, 18
Woodson v. North Carolina, 428 U.S. 280 (1976)	6, 7, 12, 13, 14, 15, 16

Constitutional Provisions:

United States Constitution

Eighth Amendment . . . . . passim

Fourteenth Amendment . . . . . passim

Statutes:

28 U.S.C. § 1257(3) 1

§ 12-22-150, Code of Alabama (1975) 4

§ 13-1-90, Code of Alabama (1975) 8

§ 13-11-1 et seq., Code of Alabama (1975) 4, 6, 7

§ 13-11-2(a), Code of Alabama (1975) 3, 6, 7, 8

§ 13-11-2(a)(2), Code of Alabama (1975) 3, 22

§ 13-11-2(b), Code of Alabama (1975) 22

§ 13-11-3, Code of Alabama (1975) 4, 19, 20

§ 13-11-4, Code of Alabama (1975) 4, 7, 18, 19

§ 13-11-4(2), Code of Alabama (1975) 19

§ 13-11-6, Code of Alabama (1975) 19

§ 13-11-7, Code of Alabama (1975) 19

§ 13-11-7(1), Code of Alabama (1975) 19

§ 13-11-7(2), Code of Alabama (1975) 19

§ 13-11-7(3), Code of Alabama (1975) 19

§ 13-11-7(4), Code of Alabama (1975) 19

§ 13-11-7(5), Code of Alabama (1975) 19

§ 13-11-7(6), Code of Alabama (1975) 19

§ 13-11-7(7), Code of Alabama (1975) 19

Code of Alabama (1819) 7

Code of Alabama (1867) 12

Code of Alabama (1876) 12

Code of Alabama (1940) 12

Ohio Rev. Code Ann., § 2929.04(B)(1975 Repl. Vol) . . . 20

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. _____

EDWARD HORSLEY, PETITIONER

v.

STATE OF ALABAMA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

Petitioner prays that a writ of certiorari issue to review the judgment and opinion and order denying rehearing of the Supreme Court of Alabama entered on June 1, 1979, and July 6, 1979, respectively.

OPINIONS BELOW

The opinion of the Supreme Court of Alabama, and its order denying a rehearing have not yet been reported. The June 1, 1979, opinion, affirming Petitioner's verdict of guilty and sentence of death, is attached in the Appendix as 1a. The July 6, 1979, order denying rehearing is attached as 2a. Attached also is the Supreme Court of Alabama's opinion in Ex parte: Brian Keith Baldwin, a companion case, here marked as 3a. Further, the decision of the Alabama Court of Criminal Appeals (unreported is attached as 4a).

JURISDICTION

The denial of rehearing was issued by the Supreme Court of Alabama on July 6, 1979, and this petition was filed within 90 days of that date. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

(1) Whether Alabama's Unique Death Penalty Act Which Precludes Juries In Capital Cases From Considering Lesser Included Offenses, Deprives All Persons Accused Of Capital Crimes Of The Due Process Rights Guaranteed Them By The Fourteenth Amendment And Violates The Eighth Amendment Prohibition Against Cruel And Unusual Punishments.

(2) Whether The Alabama Death Penalty Statute Violates The Eighth And Fourteenth Amendments In That It Places The Trial Judge In A Position Of Reducing A Jury Fixed Death Sentence If He Feels The Death Penalty Is Not Supported By The Facts.

(3) Whether Alabama's Statutory Provisions Which Limit Circumstances That May Be Considered In Mitigation Are Violative Of The Eighth And Fourteenth Amendments, Because They Prevent The Sentencing Judge From Giving Weight To Independent Mitigating Aspects Of The Defendant's Character And Record And To Circumstances Offered As A Basis For A Sentence Less Than Death.

(4) Whether Alabama Lacked Jurisdiction To Try Petitioner For Aggravated Robbery When The Robbery Complained Of Occurred In North Carolina.

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment Eight:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

United States Constitution, Amendment Fourteen:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Alabama Death Penalty Act:

(Set out in Appendix at 5a).

STATEMENT OF THE CASE

Petitioner Edward Horsley, then nineteen years old, and his companion, Brian Keith Baldwin, seized Naomi Rolon in Hudson, North Carolina. In the course of seizing Ms. Rolon, Petitioner and Baldwin stole the automobile Ms. Rolon was driving. Ms. Rolon was stabbed, her clothes were removed and she was locked in the trunk of the car. At some point Ms. Rolon was sexually assaulted.

Petitioner Edward Horsley and Baldwin then drove the stolen automobile to Alabama where they stole a pick-up truck in Wilcox County. Petitioner and Baldwin then drove to a secluded area in rural Monroe County, Alabama, onto a logging road. Petitioner took the victim out of the trunk of her car and attempted to back the car over her. She stepped out of the way and fell down. Brian Baldwin then struck Ms. Rolon in the kneck with a hatchett; the blow caused her death.

After being apprehended, Petitioner and Baldwin were jointly indicted (R. 271) under § 13-11-2(a)(2), Ala. Code (1975) for "aggravated" robbery, i.e., robbery where the victim is intentionally killed during the course of the robbery.

The Petitioner and Baldwin were separately tried. Petitioner (henceforth Horsley) was found guilty and automatically his sentence was set at death by electrocution by the jury empanelled in the Monroe County Circuit Court. Under

§ 13-11-1, et seq., Ala. Code, juries have no discretion in sentencing in capital cases. Juries must, in the words of Justice Jones either "kill 'em or let 'em go free." See, Jacobs v. State, 361 So.2d 640, 649 (Jones, J., dissenting) (1978).

Under Alabama law, the trial judge holds an "aggravation and mitigation hearing" to review the jury's verdict and then sentences the convicted Defendant to death or life without parole. See, § 13-11-3 and 4. The trial court held the required hearing and entered an order imposing the sentence of death upon Petitioner. In its order the trial court found four aggravating circumstances: (1) Defendant-Petitioner committed a robbery during the course of which the victim was intentionally killed; (2) Defendant-Petitioner was under sentence of conviction for robbery in North Carolina at the time of this offense; (3) the murder was committed during a robbery or during flight therefrom; and (4) the crime was especially heinous or atrocious or cruel. The only mitigating circumstance found by the trial court was Petitioner's age, i.e., nineteen, at the time of the offense.

Petitioner duly appealed the trial court's judgment and sentence and an appeal was "ordered" pursuant to Alabama's automatic appeal statute, § 12-22-150, Ala. Code. (R. 296). [See, Boykin v. Alabama, 395 U.S. 238, 241 (1969)]. The Alabama Court of Criminal Appeals affirmed the judgment and sentence on October 3, 1978 (4a). The Alabama Court of Criminal Appeals devoted the majority of its opinion to determining whether or not the robbery of Naomi Rolon occurred in North Carolina or Alabama. Had the Court held the robbery occurred in North Carolina, Alabama would have lacked jurisdiction over the charge of "aggravated robbery." The Alabama Court of Criminal Appeals noted that Ms. Rolon's car and keys were

taken from her in North Carolina and that those actions constituted robbery under Alabama law, citing Lambert v. State, 25 So.2d 180 (1972). However, the court reasoned that robbery was not the offense charged: "The view of this court that each of the fourteen crimes in the death penalty law consists of homicide with aggravation, and not some crime other than homicide under aggravated circumstances, is emphasized in John Louis Evans III and Wayne Eugene Ritter v. State," (cit ommitted). (4a, p. 7). While recognizing that the "fiction" that the offense of robbery was a continuing one, which carried over from North Carolina to Alabama, the court simply held that the robbery was committed in Alabama. (4a, p. 15). The Court of Criminal Appeals perfunctorily reviewed the sentence of death and found the trial judge "did not go beyond the limits of the judicial discretion vested [in him]." (4a, p. 20). On review by certiorari the Supreme Court of Alabama affirmed, in a two-sentence opinion (1a), on the authority of Ex parte Brian Keith Baldwin (3a) in which the Alabama Court held that Baldwin was guilty of "aggravated robbery" because the offense was consummated in Alabama. (3a at 3). Justice Beatty dissented on the grounds that: (a) the death penalty statute adopted the common law concept of robbery and in no wise made "aggravated robbery" a continuing offense which could cross state boundaries, and (b) the offense of robbery, under the facts of Petitioner's case, was completed in North Carolina when the victim's car and key were taken. Accordingly, Justice Beatty reasoned that Alabama lacked jurisdiction over the robbery and therefore could try Petitioner for non-capital murder alone. The majoriy opinion addressed only this one issue.

In the instant case neither Alabama appellate court addressed the constitutionality of Alabama's death penalty statute. However, the Supreme Court of Alabama had upheld

the constitutionality of the statute some five months prior to the Court of Criminal Appeals' decision in the instant case in Jacobs v. State, 361 So.2d 640 (Al. 1978).

REASONS FOR GRANTING THE WRIT

I. ALABAMA'S UNIQUE DEATH PENALTY STATUTE WHICH PRECLUDES JURIES IN CAPITAL CASES FROM CONSIDERING LESSER INCLUDED OFFENSES DEPRIVES ALL PERSONS ACCUSED OF CAPITAL CRIMES OF THE DUE PROCESS RIGHTS GUARANTEED THEM BY THE FOURTEENTH AMENDMENT AND VIOLATES THE EIGHTH AMENDMENT PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENTS.

Petitioner was tried and convicted of aggravated robbery on November 15, 1977. The trial was conducted pursuant to Alabama's death penalty statute (§ 13-11-1 et seq., Ala. Code) which was adopted after this Court's decision in Furman v. Georgia, 408 U.S. 238 (1972) but before this Court's decision in Gregg v. Georgia, 428 U.S. 153 (1976) and the other 1976 "death penalty" decisions.[1] Not only was the Alabama statute adopted in a "rush to judgment" to satisfy the apparent requirements of Furman, supra, it has never been reviewed by this Court. The statute raises serious constitutional questions which should be addressed by this Court.

The Court is not asked here to re-open the entire panolply of death penalty issues but rather is being asked to review a statute unlike that of any other American jurisdiction.

The Alabama death penalty law decrees death for certain "aggravated offenses."[2] At the trial of the issue of guilt,

[1] Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Stanislaus Roberts v. Louisiana, 428 U.S. 325 (1976).

[2] § 13-11-2(a) lists fourteen aggravating circumstances which trigger the automatic sentence of death upon a verdict of guilty.

the jury must either convict the defendant of the aggravated offense or acquit him completely because the statute provides that a capital offense "shall not include any lesser offenses." § 13-11-2(a). If the jury finds the defendant guilty of an aggravated offense, "it shall fix the punishment at death." Id. The trial judge is then required to hold a hearing to determine whether he will "refuse to accept the death penalty as fixed by the jury" and will instead sentence the defendant to life imprisonment without parole. § 13-11-4. After weighing the statutorily enumerated aggravating and mitigating circumstances, and "the fixing of the punishment at death by the jury," the judge "may accordingly sentence the defendant to death," or may reduce the jury-fixed death sentence. Id.

With the adoption of the 1975 death penalty statute (§ 13-11-1 et seq.), Alabama adopted mandatory death sentencing for the first time since the Civil War. Prior to the Civil War, mandatory sentences of death were imposed only upon slaves for the commission of certain offenses.[3] From the time of statehood, white persons, accused of capital crimes, have, until 1975, always been allowed to plead or hope for conviction of a lesser included offense. Accordingly, the mandatory death sentences, so often deplored by this Court, did not exist in Alabama for 110 years. Alabama's "community standards" used to interpret the Eighth Amendment's prohibition against cruel and unusual punishments for many years required jury consideration of lesser included offenses in death penalty cases. Only with the present statute, written with no guidance or review by this Court, has Alabama departed from its long-standing legal tradition of prohibiting mandatory death sentencing. Under Alabama's present statute there can be no

[3] For the convenience of the Court a single copy of the 1819 Code of Alabama's provisions on capital offenses committed by slaves has been filed with the Clerk in this case.

"reliability in the determination that death is the appropriate punishment in a specific case." Woodson v. North Carolina, 428 U.S. 280, 305 (1976)(plurality opinion).

A. THE DUE PROCESS VIOLATION

An Alabama capital defendant can be convicted and sentenced to die in cases where the jury has not been convinced, beyond a reasonable doubt, of all the elements of the offense charged. This absurd result is made possible by the statutory provision which precludes consideration of factually established lesser included offenses. The submission to the jury of lesser included offenses which are supported by the evidence is a commonplace of American criminal jurisprudence. In Alabama, by statute, the court is required in every non-capital murder case to charge on both first and second degree murder. It is also required to charge on other degrees of homicide, "if there is any reasonable theory which could support the position." Fulghum v. State, 277 So.2d 886 (1973); see, § 13-1-90, Ala. Code (1975).

Under the death penalty statute, however, the trial jury is precluded from considering lesser included offenses that can factually be found in a capital case. § 13-11-2(a). If the jury believes that the defendant has committed some degree of homicide but not capital murder, it is given the Hobson's choice of acquitting a killer or of returning a verdict evidencing the finding of elements about which the jury is not satisfied beyond a reasonable doubt, and carrying a death sentence.

When a jury is precluded from considering lesser offenses, and where one of the elements of the offense charged remains in doubt, but the accused is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction.

Keeble v. United States, 412 U.S. 205 (1973). In the context of a capital case this means that if a jury is convinced that an accused unjustifiably killed someone, but doubts that the requisite specific intent was present, faced with the lesser offense preclusion, it will likely "resolve its doubts in favor of conviction," even though the defendant may only be guilty of manslaughter. Id. at 213. In such a situation, the statute enables the state to obtain a capital conviction without proving the element of intent beyond a reasonable doubt.

Such an erosion of the reasonable doubt standard violates due process. Due process requires the state to prove every element of every offense charged beyond a reasonable doubt. Addington v. Texas, 25 Crim.L.Rptr. 3039 (May 2, 1979); In re Winship, 397 U.S. 358 (1970). In the words of Mr. Chief Justice Burger,

> In the administration of criminal justice our society imposes almost the entire risk of error upon itself. This is accomplished by requiring under the Due Process Clause that the state prove the guilt of an accused beyond a reasonable doubt.

Addington, supra at 3041. By encouraging capital juries to disregard this heaviest burden of proof, the Alabama statute reduces the risk on society and places it on the shoulders of defendants. Such a system cannot be permitted to stand, particularly in the context of capital cases, where the punishment is irreversible.

In Keeble, supra, this Court struck down a statutory system which precluded the jury from considering lesser included offenses. Holding that the federal Major Crimes Act could not be construed to preclude a lesser offense instruction, the Court reasoned that a contrary construction would expose defendants to a substantial risk of unwarranted convictions, as follows:

> True, if the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser included offense instruction--in this context or any other--precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction.

Id. at 212-13 (emphasis added).

The Court re-affirmed its position in Gregg v. Georgia, supra. There the Court was faced with the argument that the availability of a lesser offense instruction provided capital juries with too much discretion to satisfy the concerns set forth in Furman v. Georgia, supra. The Court rejected this argument, thereby eliminating any doubt as to the constitutional importance of preserving a capital defendant's right to such an instruction. Specifically, the plurality opinion held that a criminal justice system which, among other things, precludes lesser offense instruction "would be unconstitutional." Gregg, supra, 428 U.S. at 199-200 n. 50.

The vice of a system which precludes lesser included offenses was aptly described by Justice Jones in his dissent in Jacobs v. State, supra:

> That the statutory scheme of our death penalty Act hampers, and thus impugns, the fact-finding process, presenting the jury with a "Hobson's choice," is dramatized by the voir dire in the instant case.
>
> "A. (Prospective juror Jack R. Chandler) What you're saying is there's no in-between?
> "Q. No in-between.
> "A. Even though he was found guilty of a lesser crime?
> "Q. Yes, sir.
> "A. He still would get the death penalty, even though it was a lesser crime?
> "Q. Either that, or you turn him loose completely.
> "A. Well, why don't you have an in-between? Why is it either 'do' or 'don't'?

> "Q. I can't answer that question; but would you hesitate to find the defendant not guilty?
> "A. Yeah, I'd hesitate to find him not guilty."
>
> (The trial judge sustained the challenge for cause of this prospective juror.) An earlier examination proceeded thusly:
>
> "Q. If the evidence is not strong enough to justify your finding the defendant guilty and fixing the death penalty--yet guilty of a crime of some kind--do you think that you could acquit the defendant under those conditions?
> "A. (Prospective Juror Earl D. Allison) Not if he was guilty of some crime. No sir."
>
> Furthermore, the trial Judge, at the post-trial sentence hearing acknowledged the jurors' frustration in this regard:
>
> The jurors do not like this law. That seemed to be the comment we got when each juror was questioned on voir dire. . . ."

A strikingly similar, albeit shorter, colloquy occurred in the instant case during voir dire of the jury. (See, R. 34).

One can expect to find jurors with similar doubts and confusion on any venire summoned to hear a death penalty case in Alabama. The reluctance of jurors to acquit where the verdict must either be guilty or not guilty, formed the basis of this Court's decision in Keeble, supra.

The only reason for Alabama's adoption of its present statute, precluding lesser included offenses, was its belief that Furman required such a grisly approach. This Court's subsequent decision in Gregg v. Georgia, 428 U.S. 153, 199, no. 50 (plurality opinion), has withdrawn the foundation of that belief.

Plain and simply, this provision of the Alabama law violates due process, both in theory and in practice, because it undercuts the foundation of the criminal justice system, the requirement that the state prove every element of the offense charged beyond a reasonable doubt.

B. THE EIGHTH AMENDMENT VIOLATION

Alabama's unique "kill 'em or set 'em free" statutory scheme should be reviewed by the Court in light of the Court's decisions which post-date enactment of the death penalty legislation. The statute fails to reflect "contemporary standards of decency,"[4] contrary to the requirements of the Eighth Amendment.

To survive Eighth Amendment scrutiny, newly enacted death penalty statutes must reflect societal acceptance rather than an attempt merely to retain the death penalty in a form consistent with the Constitution.[5] Alabama has always allowed for jury consideration of lesser included offenses in capital cases where free white persons were charged. Only slaves had to face the community imposed standard of mandatory death sentencing. The community's values were clearly expressed in the Codes of 1867, 1876 and on through 1940: all allowed jury consideration of lesser included offenses. The State of Alabama, after the end of slavery, never accepted mandatory death sentencing.

In the case sub judice, the State will likely justify the statute solely on the basis that it was enacted to retain the death penalty in a form consistent with the Constitution, as interpreted by the Supreme Court in Furman. The State cannot demonstrate societal acceptance of its unique statutory scheme, which has the practical effect of obviating the necessity for proof beyond a reasonable doubt only in cases where the penalty is death.

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[4] See, e.g., Woodson v. North Carolina, supra, 428 U.S. at 295-6.

[5] Id. at 298.

The State's failure to show societal acceptance of its statutory scheme becomes more conspicuous when considered in light of the Supreme Court's decision in Coker v. Georgia, 433 U.S. 584 (1977). In Coker the Court struck down the Georgia statute which permitted the punishment of death for rape, because it violated the Eighth Amendment proscription of cruel and unusual punishments. In so holding, the Court stressed the need to consider the legislative attitudes of other states to determine whether a particular statutory provision violates the Eighth Amendment. Id. at 592.

After tracing the legislative history of the death penalty for rape in the United States, the Court found Georgia's solitude in providing capital punishment for rape to be persuasive evidence of an Eighth Amendment violation. Specifically, the Court stated:

> The upshot is that Georgia is the sole jurisdiction in the United States at the present time that authorizes a sentence of death when the rape victim is an adult woman, and only two other jurisdictions provide capital punishment when the victim is a child.

Id. at 595-6.

Likewise, Alabama is the sole jurisdiction in the United States at the present time that prohibits the consideration of factually established lesser included offenses in capital cases. As such, under Coker, Alabama's solitude is persuasive evidence of an Eighth Amendment violation.

Moreover, the Alabama statute, like those invalidated by the Court in the North Carolina and Louisiana cases, "simply papered over the problem of unguided and unchecked jury discretion" and failed to "fulfill Furman's basic requirement by replacing arbitrary and wanton jury discretion with objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death." Woodson v. North Carolina, supra, 428 U.S at 302, 303.

It is no answer to say, as the Alabama Supreme Court has said, that the post-jury-verdict judicial hearing on aggravating and mitigating circumstances remedies this deficiency. Certainly this judicial hearing will not lessen the arbitrariness of the jury's decision. In the first place, the jurors may not even be aware that such a hearing exists. If the jurors do know about it, their knowledge certainly will not inform or guide their deliberations in any regular or reviewable channels. The jury's willingness or unwillingness to subscribe to a death verdict can still express itself only "lawlessly" under the guise of a guilty/innocence determination, Woodson v. North Carolina, supra, 428 U.S. at 303,[6] and be formed only upon the record of the trial of guilt or innocence, "lacking as it usually is in [much] of the information that is relevant to the sentencing decision," Gregg v. Georgia, 428 U.S. at 190 (plurality opinion). Such speculation as the jury may indulge in regarding the trial judge's possible reduction of its verdict introduces nothing but an additional dimension of vagary into the process.

Moreover, the jury's sense of accountability is likely to be attenuated by whatever knowledge it may have of the judge's power to reduce the sentence it has "fixed." The entire sentencing process is not thereby made more reliable, but less responsible. For, as we shall see in the following subsection of this brief, the Alabama procedure strongly encourages the judge to accept, not "refuse to accept," the jury's death verdict. The prospect of each nominal sentencing

[6]The majority opinion of the Alabama Supreme Court in Jacobs v. State, supra, 361 So.2d at 643, admits, as it must, that the jury obviously is not provided with guidelines to aid it in fixing the punishment; in fact, the statute directs the jury, if it finds the accused guilty, to fix the punishment at death. The jury has no discretion to fix any other punishment.

agent deferring to the other while the defendant suffers the death sentence that is statutorily required to be fixed in the jury's verdict holds no promise of either reliability or responsibility.

Finally, the trial judge does not review the jury's verdict in any sense. He has no more capability than his North Carolina and Louisiana counterparts had to "check arbitrary and capricious exercise of [the jury's] . . . power." Woodson v. North Carolina, supra, 428 U.S. at 303. If the jury votes for death, he may choose to supersede it; but his choice cannot be made upon the basis of any understanding of its unfathomable verdict. In short, as Justice Jones wrote in dissent in Jacobs v. State, supra, at 361 So.2d at 650, the judge's "subsequent consideration of mitigating factors cannot rectify the unconstitutionally unreliable sentence already imposed."[7]

[7]Of course, if one indulges the assumption--contrary to Woodson and Stanislaus Roberts--that the jury's verdict will not reflect sentencing consideration but will respond entirely to questions of guilt or innocence and to the jury's statutory obligation to fix the punishment upon conviction at death, then the Alabama procedure ineluctably raises the constitutional issue which was included in the grant of certiorari, but whose decision was reversed, in Lockett v. Ohio, infra: whether juries can be wholly excluded from participation in the capital sentencing decision. That issue is also raised, albeit in somewhat different form, if the jury's participation in capital sentencing is conditioned upon its "willingness to act lawlessly," Woodson v. North Carolina, supra, 428 U.S. at 303. Alabama juries either have no sentencing power, or they have a lawless and arbitrary sentencing power: In either event, the Alabama system violates the Eighth and Fourteenth Amendments.

II. THE STATUTORY PROCEDURE WHICH DEFERS CONSIDERATION OF AGGRAVATING AND MITIGATING CIRCUMSTANCES UNTIL AFTER A JURY HAS IMPOSED A SENTENCE OF DEATH PLACES THE TRIAL JUDGE IN A POSITION OF HAVING TO REDUCE A JURY-FIXED DEATH SENTENCE IF HE FEELS THE DEATH PENALTY IS INAPPROPRIATE AND RAISES SUBSTANTIAL QUESTIONS UNDER THE DUE PROCESS CLAUSE AND THE EIGHTH AMENDMENTS.

It is clear that "in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." Woodson v. North Carolina, supra, 428 U.S. at 304. It is also clear that "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause. . . . [because] [t]the defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process." Gardner v. Florida, 430 U.S. 349, 358 (1977)(plurality opinion). Any capital sentencing procedure, then, must assure "reliability in the determination that death is the appropriate punishment in a specific case," Woodson v. North Carolina, supra, 428 U.S. at 305 and it must comport with fundamental fairness, Witherspoon v. Illinios, 391 U.S. 510 (1968).

An Alabama trial judge comes to the "constitutionally indispensable part of the process of inflicting the penalty of death" only after a jury verdict has been publicly pronounced --and publicized--which sentences the defendant to die without consideration of mitigating circumstances. The judge is thus placed in the exposed position of having to override the jury's

death sentence, and to take the public heat of "refusing to accept" a death sentence, in order to give the defendant the benefit of the sentencing hearing which is his constitutional due. Such a procedure is equivalent, at the sentencing stage, to beginning a trial on the issue of guilt or innocence by publicly proclaiming that the defendant is guilty and that a trial will now be held to determine whether he should be found guilty.

Indeed, Alabama's death-sentencing procedure is worse, because the pre-announced verdict of death carries the imprimatur of a jury of twelve citizens who, in public contemplation, appear to have sat in judgment on the case even though they have not in fact observed federal constitutional standards in fixing the sentence of death--standards which require that the sentencing agency "consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed." Jurek v. Texas, 428 U.S. 262, 271 (1976). A procedure which compels the judge to place himself in a publicly unfavorable light in order to do his minimal constitutional duty[8] is too fraught with peril to be permitted consistently with due process,[9] and too unreliable to pass Eighth Amendment muster.

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[8] Such a process embroils the judge in the passion of the day and forces him to "assume primary responsibility in choosing between competing political, economic and social pressures." Dennis v. United States, 341 U.S. 494, 525 (1951) (Frankfurter, J., concurring in affirmance of judgment).

[9] Cf. Connally v. Georgia, 249 U.S. 245 (1977); Ward v. Village of Monroeville, 409 U.S. 57 (1972); Tumey v. Ohio, 273 U.S. 510 (1927). See, also, Gardner v. Florida, supra, 430 U.S. at 403 ("Florida argues that trial judges can be trusted to exercise their discretion in a responsible manner. . . . However acceptable that argument might have been before Furman v. Georgia, it is now clearly foreclosed."); Johnson v. Mississippi, 403 U.S. 212 (1971).

Justice Jones, in dissent in Jacobs v. State, supra, 361 So.2d at 650, noted the "outcry of unjustified criticism attendant with a trial judge's reduction of a sentence to life imprisonment without possibility of parole, after a jury has returned a sentence of death."

> I call attention to the case of State v. Nolen, Circuit Court No. 7702059 (February 17, 1978), in which the trial Judge was made the object of voluminous public ridicule, including a resolution of condemnation by the State Legislature, numerous newspaper editorial and cartoons, Letters to the Editor, speeches, etc. To be sure none of this criticism, to my knowledge, was based upon the merits of the statutory function of the judiciary; rather it was directed toward "Unwarranted" tampering by a trial Judge with a jury verdict.

Id. at 650 n. 3.

Even if a judge were able and willing to disregard the jury sentence of death, the statute specifically instructs him to consider it. He is directed to weigh "the aggravating and mitigating circumstances, and the fixing of the punishment at death by the jury." § 13-11-4 (emphasis added). A system which so plainly "stack[s] the deck against" the defendant, Witherspoon v. Illinios, supra, 391 U.S. at 523, results in a distortion of "the balance of forces between the accused and his accuser," Wardius v. Oregon, 412 U.S. 470, 474 (1973). Where the defendant's life is at stake, it also ignores the "vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be based on reason rather than caprice or emotion," Gardner v. Florida, supra, 430 U.S. at 358.

III. THE STATUTORY PROVISIONS WHICH LIMIT CIRCUMSTANCES THAT MAY BE CONSIDERED IN MITIGATION ARE AKIN TO THOSE CONDEMNED IN LOCKETT V. OHIO.

The Alabama statute specifies seven narrowly defined factors which "shall be" mitigating circumstances[10] and which shall be weighed by the trial judge against the aggravating circumstances[11] to determine whether the judge will accept or refuse to accept the jury-fixed death sentence, §§ 13-11-3, 13-11-4. The mitigating circumstances deal with the defendant's prior criminal record,[12] his mental state at the time of the commission of the crime,[13] his age[14] and his participation in the criminal act which has resulted in his jury sentence of death.[15]

By the plain language of the statute, the trial judge is not permitted to weigh any non-statutory mitigating circumstance in reaching his decision.[16] Nor has the Alabama

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[10] § 13-11-7. [11] § 13-11-6.

[12] § 13-11-7(1). [13] § 13-11-7(2), (5), (6).

[14] § 13-11-7(7).

[15] § 13-11-7(4). The seventh mitigating circumstance deals with the rare situation in which the victim was a participant in his own death. § 13-11-7(3).

[16] All references throughout the statute are to the specific statutory mitigating circumstances. § 13-11-3 requires that the trial judge hear evidence relating to the specific statutory mitigating circumstances. § 13-11-4 requires that the court weigh "the aggravating and mitigating circumstances," and § 13-11-4(2) requires that a trial court support a death sentence by making written findings which shall support a death sentence by making written findings which shall at least include:

> (2) Any of the mitigating circumstances in § 13-11-7 which it finds insufficient to outweigh the aggravating circumstances.

Finally, § 13-11-7, in listing mitigating circumstances, contains the following limiting language:

> Mitigating circumstances shall be the following . . . (Emphasis added).

Supreme Court construed the statute to permit the consideration of non-statutory mitigating circumstances.[17] In sustaining its constitutionality, the court has relied instead upon the provision of § 13-11-3 which permits the introduction of evidence as to "any matter that the court deems relevant to sentence." Jacobs v. State, supra, 361 So.2d at 652-653.[18]

Thus, a defendant is permitted to offer evidence relevant to sentence; but under the terms of the statute, all such evidence must be considered in relation to the limited statutory mitigating circumstances.[19] This approach to mitigation is indistinguishable from that of the Ohio statute condemned in Lockett v. Ohio, 98 S.Ct. 2954 (1978), which provided that the death penalty was precluded "when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of [three enumerated mitigating circumstances] . . . is established. . . ." Ohio Rev. Code Ann. § 2929.04(B)(1975 Repl. Vol), quoted in Lockett, supra, 57 L.Ed.2d at 991-2. Notwithstanding that the Ohio Supreme Court had construed this provision to mean that "the sentencing judge or judges may consider factors such as the age and criminal record of the defendant in determining whether any of the mitigating circumstances is established,"

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[17] In his separate opinion in Jacobs v. State, supra, 361 So.2d at 648, Chief Justice Torbert wrote that "[t]he list of mitigating circumstances in section 13-11-7, Code of Alabama, 1975, is exclusive. . . ."

[18] "It is readily apparent, therefore, that Alabama's sentencing scheme broadly allows the accused to present evidence of mitigating circumstances." Jacobs v. State, supra, 361 So.2d at 652-3.

[19] In the recent case of Ex parte Recardo Cook (Re: Recardo Cook v. State of Alabama, SC 77-320, Ala. Sup. Ct., September 10, 1978), the Alabama Supreme Court described this shoehorning process as "categorizing the evidence received and balancing the aggravating circumstances with the mitigating circumstances."

id. at 2966, the Ohio procedure was invalidated because it prevented the sentencer "from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation," id. at 2965 (emphasis added). The Court further noted that "[n]one of the statutes we sustained in Gregg and the companion cases clearly operated at that time to prevent the sentencer from considering any aspect of the defendant's character and record or any circumstances of his offense as an independently mitigating factor." Id. at 2966.

Alabama's statute operates the same way.[20] Therefore, the Court's decision in Lockett mandates a declaration that the Alabama statute violates the Eighth and Fourteenth Amendments.

IV. ALABAMA LACKED JURISDICTION TO TRY APPELLANT FOR AGGRAVATED ROBBERY. IN THAT THE ROBBERY COMPLAINED OF OCCURRED IN NORTH CAROLINA.

Petitioner and his companion Brian Baldwin robbed Naomi Rolon in North Carolina. They took from her, her automobile and car keys. The car was clearly under the control of the Petitioner and Baldwin while in North Carolina.

Both Alabama appellate courts recognized that the offense of robbery was completed in North Carolina but maintained that aggravated robbery was a distinct, separate offense which was consummated in Alabama where Naomi Rolon was killed.

One of the aggravated offenses for which a person may be sentenced to death in Alabama is: "Robbery or attempts

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[20] In finding a non-statutory mitigating circumstance in this case, the trial judge exceeded the role assigned him by statute. His supererogatory effort toward fairness is irrelevant to an analysis of the challenged statute's facial validity.

thereof when the victim is intentionally killed by the Defendant." § 13-11-2(a)(2), Ala. Code (1975).

Justice Beatty of the Alabama Supreme Court has carefully analyzed this statutory provision and has noted:

> Robbery has always been understood by lawyers as the term describing the felonious taking of goods of value from the person of another or in his presence by violence to his person or by putting him in fear. Cobern v. State, 273 Ala. 547, 142 So.2d 869 (1962). Quite distinctly, however, murder is the unlawful killing of a human being with malice aforethought. Hornsby v. State, 16 Ala.App. 89, 75 So. 637 (1917). It cannot be seriously contended, because an intentional killing occurs during a robbery, that the two offenses, robbery and murder, become the same offense. And since they do not thereby become the same, it follows that by charging a defendant with murder he is not thereby charged with robbery.

Evans v. State, 361 So.2d 666, 670 (1978)(Beatty, Jr., dissenting).

Justice Beatty further notes that § 13-11-2(a)(2) does not even require proof of "murder" during a robbery inasmuch as the intentional killing of the victim contemplated by the statute could embrace manslaughter as well as murder. Evans v. State, supra at 670. Justice Beatty is correct in pointing out that the aggravated robbery becomes even more incomprehensible when § 13-11-2(b)'s prohibition of the use of the felony-murder doctrine is examined. Murder in the commission of a robbery is simply not required to be shown by the statute.

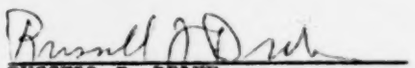
If the statute embraces two conceptually different offenses then the time and place aspects of each can differ, as they did in the instant case. The robbery of which Petitioner was convicted occurred in Hudson, North Carolina. not Monroe County, Alabama. Robbery was the charge against Petitioner, not murder.

It is axiomatic that when a state puts a defendant to trial on a charge over which it lacks jurisdiction, the defendant is denied due process of law. The Alabama trial court simply lacked jurisdiction.

CONCLUSION

Petitioner requests that the Court grant his petition for writ of certiorari to the Alabama Supreme Court in order that the Court may review the constitutionality of the Alabama death penalty statute and further to determine whether or not the Alabama trial court lacked jurisdiction over the offense Petitioner was charged with having committed.

Submitted by,



RUSSELL J. DRAKE
DRAKE AND PIERCE
1509 University Boulevard
Tuscaloosa, Alabama 35401

ATTORNEY FOR PETITIONER

JUN 0 • 1979

THE STATE OF ALABAMA - - - - - - JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1978-79

Ex parte: Edward Horsley

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS

(In re: Edward Horsley

78-87 v.

State of Alabama)

ALMON, JUSTICE.

This cause is due to be affirmed on authority of Ex parte Brian Keith Baldwin v. State, [Ms. June 1, 1979], ___So. 2d ___ (Ala. 1979).

We have carefully reviewed the opinion of the Court of

Criminal Appeals and the record of the proceedings in this cause, and are convinced that the judgment of the Court of Criminal Appeals is due to be, and is affirmed.

AFFIRMED.

Torbert, C. J.; Bloodworth, Maddox, Faulkner, Shores and Embry, JJ., concur.

Jones, J., concurs in the result for the same reason stated in Ex parte Brian Keith Baldwin v. State, [Ms. June 1, 1979], _____So. 2d ____(Ala. 1979).

Beatty, J., dissents.

BEATTY, JUSTICE (dissenting):

The Court of Criminal Appeals' opinion concedes that the main issue in this case is whether the "crime made the basis of the prosecution was wholly committed outside of Alabama. . . ." That Court then proceeds to hold that the offense charged, "Robbery or attempts thereof when the victim is intentionally killed . . ." is not consummated until death occurs. Thereafter by a convoluted process it is held that under the facts of this case the asportation of the automobile was a continuing process: "[T]hey never ceased their effort to separate the two, whether Naomi from the automobile or the automobile from Naomi . . . ." That Court added: "Their effort to take permanently and indefinitely away from her the automobile was thwarted only by the automobile's sudden and unexpected immobility." Thus it was established that this robbery became a "continuing" offense because the "process of the robbery" continued from Hudson, North Carolina to Monroe County, Alabama, somehow establishing a "logical connection" between the crime of robbery and the crime of intentional homicide.

Therein lies the difficulty, for I cannot determine whether the court below is interpreting the statute to mean that the legislature established a new and continuing offense under § 13-11-2(a)(2) or whether it is holding that under these facts this robbery continued in its commission until the victim was killed. My conclusion is that the latter holding was intended, however each position deserves some comment.

I have already expressed my views on the nature of this crime, the significance of the legislature's use of the common law term "robbery," and the rule of strict construction to be applied in criminal cases. See Evans v. State, Ala. Crim. App., 361 So.2d 666 (1978) (Beatty, J., dissenting). It would appear a fortiori that our earlier decisions on the elements of robbery would control the definition of robbery in this statutory crime, given the fact that "robbery" is not defined in the death penalty statute. That being so, we should take the statute as it stands, and as it stands it does not make robbery a continuing offense to furnish the aggravation necessary under that statute. While the notion that the robbery continues because the owner of the property is forcefully taken along and thus somehow remains in possession of it is an appealing one from the point of view of law enforcement, nevertheless it is not a proposition heretofore accepted in such cases by our law. Lambert v. State, 48 Ala. App. 600, 266 So.2d 812 (1972) and Root v. State, 32 Ala. App. 253, 25 So.2d 180 (1946) are directly in point and, applying the common law definition of robbery, each held that the offense was complete when the thief took control of the automobile which was the subject of the robbery. The language of Root, 32 Ala. App. 253, 255 is peculiarly apt here:

> It is our opinion that the possessive or manucaptive element essential in robbery was present in this case. From the moment that these defendants and Lewis entered his automobile these appellants only were in full control and possession thereof. True,

> Lewis was present at all times. However, his status was that of a robot. His dominion over the automobile was completely negatived by the will and pistols of the appellants. It is our opinion that the facts of this case spell out that on the part of the appellants there was a felonious taking of property from the person of another, or in his presence, against his will, by violence or putting in fear. The fact that the owner was carried along against his will when the property was taken is incidental and should not affect the decision. . . .

And under the facts of this case as described by the Court of Criminal Appeals, the robbery was complete in North Carolina when the defendant "seized the automobile and the keys thereof. . . ." It follows that we have jurisdiction over the murder, Code of Ala. 1975, § 13-1-70 but not the robbery because the robbery was a completed offense in North Carolina and the victim was not killed during the course of that robbery.

Finally, I must confess to having been moved by the heinous nature of the defendant's conduct and a natural sympathy for the helpless victim. Unfortunately, I find that emotion of little help in my attempt to apply the applicable law objectively. Additionally, I appreciate the cited editorial comments of Mr. Bishop. He is also reputed to have written that classical enjoinder, "Hard cases makes bad law."

I, J.O. Sentell, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said Court.
Witness my hand this 1 day of June, 79

J.O. Sentell

Clerk, Supreme Court of Alabama

JUL 6 1979

77-735

CITY OF BIRMINGHAM

VS.

THE MEAD CORPORATION, ET AL.

JEFFERSON CIRCUIT COURT NO. 195-658 and 189-677

CITY OF BIRMINGHAM

VS.

CITY OF HOMEWOOD, ET AL.

IT IS ORDERED that the application for rehearing filed in these causes be, and the same is hereby, overruled.

77-718

B. D. PETERSON, ET AL.

VS. JEFFERSON CIRCUIT COURT #CV78-502-400

JEFFERSON COUNTY, ET AL.

IT IS ORDERED that the application for rehearing filed in this cause on June 22, 1979, be, and the same is hereby, overruled.

78-87

EX PARTE: EDWARD HORSLEY

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

(Re: Edward Horsley vs. State of Alabama)

IT IS ORDERED that the application for rehearing filed in this cause on June 14, 1979, be, and the same is hereby, overruled.

I, J. O. Sentell, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said Court.
Witness my hand this 26th day of Sept. 1979

J. O. Sentell

Clerk, Supreme Court of Alabama

THE STATE OF ALABAMA - - - - - - JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1978-79

Ex parte: Brian Keith Baldwin

78-127 PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

(In re: Brian Keith Baldwin

v.

State of Alabama)

TORBERT, CHIEF JUSTICE.

Petitioner was convicted of the capital felony of robbery when the victim is intentionally killed by the defendant and was sentenced to death by electrocution.

We granted certiorari to review the decision of the Court of Criminal Appeals affirming Baldwin's conviction. The facts as set forth in the opinion of the Court of Criminal Appeals, are as follows:

> The victim of the appellant's vicious crime was a sixteen-year-old girl named Naomi Rolon. On November 25, 1976, she was driving across town in Hudson, North Carolina, to visit her father who was in a local hospital. She was abducted before reaching her destination by the appellant and his companion, Edward Horsley, both of whom were escapees from a North Carolina prison camp at the time. They took control of her automobile and drove to Charlotte, North Carolina, where they attempted to rape her and to choke her to death. They stripped her of all her clothing except her shoes and socks. She was stabbed with a knife in various parts of her body and then locked in the trunk of the automobile she had been driving. Baldwin and Horsley then drove the car through South Carolina to Atlanta, Georgia, where they spent the night. They next drove through Montgomery, Alabama, on Interstate Highway 85 and then proceeded to Camden, Alabama, located in Wilcox County. The victim remained locked in the trunk of the car during the entire trip.
>
> In Camden, the appellant stole a pick-up truck which contained a hatchet. Horsley drove the automobile, and the appellant drove the truck to an isolated spot in Monroe County. There they removed the victim from the trunk of the car, and Horsley attempted to run the car over her. After several unsuccessful attempts to kill the victim with the automobile, the appellant took the hatchet from the truck and killed her with a blow leaving a gaping wound in the base of her neck. The two killers were later arrested in Lanett, Alabama, where they were traveling in the stolen truck. The automobile tag from the victim's car was found in the truck which appellant was driving. Both were transported to the Wilcox County Jail on the truck theft charge.

The only issue presented for review is whether the State of Alabama had jurisdiction to try the offense. Petitioner contends that the robbery took place outside of Alabama and the killing took place within Alabama; therefore,

the venue of the crime of robbery was not within the state and there was no jurisdiction to try petitioner in Alabama so the verdict of the jury and judgment of the trial court are void. We disagree.

The crime of robbery when the victim is intentionally killed is a single offense beginning with the act of robbing or attempting to rob and culminating with the act of intentionally killing the victim. The offense consists of two elements, robbing and intentionally killing, but does not consist of two separate offenses. See Ex parte Roy Frank Clements, [MS. January 26, 1979] ___ So. 2d ___ (Ala. 1979); Horsley v. State, [1 Div. 931] ___ So. 2d ___ (Ala. Crim. App. 1978). Therefore, although the offense was commenced in North Carolina, it was not consummated until Naomi Rolon was killed in Monroe County, Alabama.

The place where the crime was consummated is the place where the crime was committed and the place where the defendant may be tried. 21 Am. Jur. 2d Criminal Law § 399, at 416. Section 15-2-4 provides:

> When the commission of an offense commenced elsewhere is consummated within the boundaries of the state of Alabama, the offender is liable to punishment in Alabama, although he was out of the state at the commission of the offense charged, if he consummated it in this state through the intervention of an innocent or guilty agent or by any other means proceeding directly from himself; and venue in such case is in the county in which the offense was consummated, unless otherwise provided by law.

§ 15-2-4, Code 1975.

Accordingly, venue did lie in Monroe County and petitioner was properly tried and convicted. The decision of the Court of Criminal Appeals is affirmed.

AFFIRMED.

Bloodworth, Maddox, Faulkner, Almon, Shores, and Embry, JJ., concur.

Jones, J., concurs in the result.

Beatty, J., dissents.

JONES, JUSTICE (Concurring in the result):

I concur in the result to affirm. I see no necessity to deal with what I perceive as a purely academic exercise: Whether the capital offense here charged is one or two offenses. It is one offense in the sense that both robbery and intentional killing must co-exist to constitute the capital offense contemplated by the Death Penalty Statute. In another aspect, it is two separate and distinct offenses--each of which must be charged, instructed upon, and all the elements of which must be found as a prerequisite to a guilty verdict on the capital offense charged.

The point is this: It is unimportant whether it is denominated one offense comprised of two elements, or two offenses--1) intentional killing in the course of 2) robbing the victim. The disposition of this appeal in no way depends upon the one offense/two offenses dichotomy. As the opinion of the Court of Criminal Appeals points out, the offense of robbery was consummated in Alabama and the offense of intentional killing was consummated in this State. There is no jurisdictional problem.

BEATTY, JUSTICE (dissenting):

For the reasons expressed in my dissent in Ex parte Edward Horsley, Ala., [Ms. June 1, 1979], ___ So.2d ___ (1979), I also dissent in this case.

I, J.O. Sentell, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said Court. Witness my hand this 1 day of June 1979

J.O. Sentell

Clerk, Supreme Court of Alabama

OCT 3 1978

THE STATE OF ALABAMA --- JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1978-79

1 Div. 931

Edward Horsley

v.

State

Appeal from Monroe Circuit Court

CLARK, RETIRED CIRCUIT JUDGE

Appellant-defendant was jointly indicted with one Brian Keith Baldwin (Baldwin v. State, 1 Div. 901) for the alleged robbery and intentional killing of Naomi Rolon subsequent to the effective date of the Death Penalty and Life Imprisonment Without Parole Statute of Alabama (Acts 1975 No. 213, Code of Ala. 1975, § 13-11-1, et seq.)

The two defendants were tried separately. Whether the severance was made at the request of either defendant is not shown by the record in this case. In the absence of a request or objection by one or more co-indictees, it is in the trial court's discretion whether the trial will be separate or joint and, where the record is silent on the subject, it will be presumed that the action of the trial court was proper. Palmer v. State, 15 Ala. App. 262, 73 So. 139 (1916); Matthews v. State, 54 Ala. App. 359, 308 So. 2d 718 (1975).

Upon a determination of defendant's indigency, the trial court appointed counsel to represent him on the trial, and after his conviction the same counsel were appointed to represent him on appeal. They have done so with commendable skill and dedication.

Oral evidence on the issue raised by defendant's plea of not guilty consisted exclusively of testimony of witnesses for the State. No witness took the stand for defendant. Defendant himself testified on matters pertaining to the question of the admissibility of some items of evidence, but he did not testify, and did not submit himself as a witness, on the question of his guilt or innocence.

The jury found him guilty as charged in the indictment and fixed his punishment at death by electrocution. Pursuant to §§ 13-11-3 and 13-11-4 of the Death Penalty and Life Imprisonment Without Parole Statute of Alabama, the court conducted a hearing to aid it in determining whether the court would sentence the defendant to death or to life imprisonment without parole and thereafter sentenced defendant to death and set forth in writing, as a basis for the sentence of death, its findings of fact from the trial and the sentence hearing. The findings include four separate aggravating circumstances as listed in § 13-11-6 and only one of the mitigating circumstances listed in § 13-11-7 of the Death Penalty and Life Imprisonment Without Parole Statute, which was the age of the defendant at the time of the commission of the crime, to-wit, nineteen years.

Soon after defendant was indicted and counsel was appointed for him, a motion was made in his behalf for an investigation and examination as to whether he should be tried as a youthful offender. The court ordered the investigation and examination and, after considering the same, ordered that he "shall not be arraigned and tried as a youthful offender."

According to the undisputed evidence, some of which included confessions of defendant, on the night of March 12, 1977, Naomi Rolon, sixteen years of age, left her home in Hudson, North Carolina, to visit her father who was hospitalized there. She was driving her mother's 1970 Chevrolet Impala, License Plate No. North Carolina EPN-720. Defendant and Brian Keith Baldwin, who at the time were escapees from the Hudson Prison Unit in Hudson, North Carolina, seized the automobile and the keys thereof and drove it to Charlotte, North Carolina, with Naomi therein, despite her protests, pleadings and prayers. At Charlotte they choked her and attempted to rape her. She was stripped of her clothes, stabbed with a knife in various parts of her body, and locked in the trunk of her mother's automobile. They proceeded from there through a part of South Carolina, through Georgia via Atlanta, largely on I-85, and reached Montgomery. Thereafter, they veered from I-85 and drove to Camden, Alabama, where Baldwin stole an El Camino pickup truck, in which was a hatchet. From Camden, Baldwin drove the truck and Horsley drove the Chevrolet Impala, with Naomi in the trunk, down Highway 41 into Monroe County. They drove off the highway into a wooded and bushy area. At that place, Baldwin took Naomi out of the trunk of the automobile and told Horsley to back over her. When he backed up, Naomi stepped out of the way, stumbled into some pine tops, where Horsley again tried to back over her but the wheels of the automobile started spinning. Baldwin then took the hatchet that was in the stolen truck and killed her with it, saying to her, "Move your hands so I can get it over with."

She was moaning before he hit her with the hatchet. A blow from the hatchet caused a large gaping wound in the base of her neck that caused her death.

The killing occurred on the night of March 14, 1977. Horsley and Baldwin attempted to cover Naomi's body with pine tops and other brush, left the automobile in the woods, proceeded north in the truck that had been stolen at Camden, and arrived in Lanett, Alabama, at about 3:00 A.M., March 15, where they were apprehended by the police. In the truck was the automobile tag that Horsley had taken off the Rolon automobile in the woods in Monroe County.

Appellant's basic contention for a reversal is found in the first two paragraphs of the conclusion of his brief as follows:

> "The issue before this Court is whether Alabama has jurisdiction of an offense charged under § 13-11-2(a)(2), Code of Alabama, 1975, when the crime which is the basis for the prosecution thereunder is committed wholly outside of Alabama.
>
> "The crime of robbery should not be construed to be a continuing offense simply because it is set forth in the Death Penalty Act, and the conviction of Edward Horsley cannot stand because Alabama did not have jurisdiction of the offense alleged in the indictment."

As to the first quoted paragraph, we have no difficulty in agreeing with appellant that, if the crime made the basis of the prosecution was wholly committed outside of Alabama. Alabama has no jurisdiction thereof. There is no contention to the contrary. Nevertheless, appellee strongly contends the crime charged in this case was (not committed wholly) outside of Alabama. As to that contention, appellant is in disagreement, and there we find the hard core of the main issue between the parties: whether the crime charged was committed wholly outside of Alabama and, if not, whether enough of it was committed in Alabama as to give the courts of Alabama jurisdiction thereof and enough of it committed in Monroe County to make such county a proper venue. We must proceed to a determination of that question.

We deem applicable what was stated in State v. Parrish, 242 Ala. 7, 14, 5 So. 2d 828, 834 (1941):

> "In 22 C.J.S., Criminal Law, §§ 133 and 134, pages 217-219, it is declared that courts of a particular sovereignty have no extra territorial jurisdiction of offenses committed outside of their territorial jurisdiction; and on worthy authority it is declared that some offenses partly committed abroad may nevertheless be within the jurisdiction of a local court...."

A correct determination of the question cannot be made without careful consideration of the language of the indictment and the language of the particular part of the statute applicable to the crime charged in the indictment. The indictment is as follows:

> "The Grand Jury of said County charge that before the finding of this indictment Brian Keith Baldwin and Edward Horsley, whose names are to the Grand Jury otherwise unknown, feloniously took one 1970 Chevrolet automobile of the value of, to-wit: $400.00, and one set of keys of the value of, to-wit: $1.00, being of the total and combined value of, to-wit: $401.00, the property of Naomi Rolon, from her person, and against her will, by a violence to her person, or by putting her in such fear as unwillingly to part with the same, and said Brian Keith Baldwin and Edward Horsley, whose names are to the Grand Jury otherwise unknown, in the course of the aforesaid robbery, did intentionally kill the said Naomi Rolon by cutting her with a hatchet or other heavy cutting instrument, a further description of which is unknown to the Grand Jury, and that said offense took place subsequent to March 7, 1977, against the peace and dignity of the State of Alabama."

Pertinent provisions of the Death Penalty and Life Imprisonment Without Parole Statute (Acts 1975, No. 213) are as follows:

> "AN ACT
>
> "To provide for a sentence of death or life imprisonment without parole in certain aggravated offenses; to prescribe the manner of charging and sentencing in such cases and to eliminate lesser included offenses in such cases; to limit the maximum punishment in all other cases to life imprisonment; to provide for an effective date of this act.
>
> "Be It Enacted by the Legislature of Alabama:

"Section 1. Except in cases enumerated and described in Section 2 herein, neither a court nor a jury shall fix the punishment for the commission of treason, felony, or other offenses at death, and the death penalty or a life sentence without parole shall be fixed as punishment only in the cases and in the manner herein enumerated and described in Section 2 of this Act. In all cases where no aggravated circumstances enumerated in Section 2 are expressly averred in the indictment, the trial shall proceed as now provided by law, except that the death penalty or life imprisonment without parole shall not be given, and the indictment shall include all lesser offenses.

"Section 2. If the jury finds the Defendant guilty, they shall fix the punishment at death when the Defendant is charged by indictment with any of the following offenses and with aggravation which must also be averred in the indictment, and which offenses so charged with said aggravation shall not include any lesser offenses:

....

"(b) Robbery or attempts thereof when the victim is intentionally killed by the defendant.

....

"Evidence of intent under this section shall not be supplied by the felony-murder doctrine."

In arguing for a reversal, appellant places great emphasis upon the fact that the robbery as alleged in the indictment was committed in North Carolina. The automobile and the keys of the automobile were taken from the victim by force, she was placed in the trunk of the automobile, and defendant and Baldwin gained complete control of the automobile and the keys in North Carolina. This, according to the law of Alabama, constituted a robbery in North Carolina, as all the elements of the crime of robbery had been committed in that State. Lambert v. State, 48 Ala. App. 600, 266 So. 2d 812 (1972); Root, et al v. State, 32 Ala. App. 253, 25 So. 2d 180, cert. denied, 247 Ala. 514, 25 So. 2d 182 (1946).

Notwithstanding the importance of robbery as an essential element of the crime charged, it did not constitute the crime charged in the indictment or a crime proscribed by the death penalty statute. No crime proscribed by that statute

falls short of an intentional killing. Each of the fourteen crimes enumerated in the statute has within it the culminating factor of an intentional homicide. The statute is for the prevention and punishment of homicides committed under legislatively determined aggravating circumstances. It is impossible to complete, to consummate, any of the fourteen crimes enumerated without the intentional taking of the life of a human being. Nothing could be clearer, irrespective of the language used as to some of the crimes and the language employed as to others. Thus it has been held.

> "This case concerns the constitutionality of Act 213, 1975 Ala. Acts, p. 701, et seq., which provides penalties for certain aggravated homicides ***"
>
> In Re: Jerry Wayne Jacobs, S. Ct. 2808, May 19, 1978.

The view of this court that each of the fourteen crimes in the death penalty law consists of homicide with aggravation, and not some crime other than homicide under aggravated circumstances, is emphasized by what was said in John Louis Evans, III and Wayne Eugene Ritter v. State, Ala. Cr. App. So. 2d (1977), cert. denied, Ala. So. 2d (1978) as follows:

> "John Louis Evans, III, and Wayne Eugene Ritter were each charged by indictment with the first degree murder of one Edward A. Nassar by shooting him with a pistol while in the commission of a robbery, being a 'capital murder' offense within the meaning of Act No. 213, Section 2, Subsection (b), Acts of Alabama 1975, Regular Session."

Each count of the indictment in Evans and Ritter charged them with murder in the first degree. In his dissenting opinion in Evans and Ritter, supra, Mr. Justice Beatty is of the opinion:

> "Clearly, the language of this statute requires that the indictment charge the accused with robbery wherein death results; that is, robbery becomes the principal aggravated offense when the victim is killed during its commission. By these express provisions, an indictment for aggravated robbery, not for murder, triggers the imposition of the death penalty under this particular Section...."

Although our view as just expressed seems inconsonant with the conclusion of Justice Beatty in Evans and Ritter, it is not out of harmony with his supporting rationale, as found in the distinction he makes between murder and intentional manslaughter, manslaughter in the first degree, in that malice is an essential element of murder but is not an element of manslaughter. Our opinion in Evans and Ritter considers that the indictment went further than was necessary in charging murder, particularly murder in the first degree. Although a homicide that occurs in a robbery "when the victim is intentionally killed by the defendant" does not require malice, we concluded that there was no harm to defendants by reason of the indictment's charging more than the statute required. As the indictment in this case charges an "intentional killing" but does not charge "murder" in either degree, we believe what we have said herein is not in the direct line of the opposition expressed by Mr. Justice Beatty in his dissenting opinion in Evans and Ritter.

We note also that Judge Bookout, in his dissent in Clements v. State, Ala. Cr. App., (7 Div. 575), is of the view that the offense charged in the indictment therein was not the offense denounced in the now and then pertinent provision of the statute, which, according to him, is "robbery" under the aggravating circumstance of an "intentional killing" of the victim. In that respect, the case before us is distinguishable from Clements, in that in Clements defendant was charged with murder in the first degree, while appellant herein was not charged with murder in either degree.

The remoteness in time and space, between the commencement and the end of the atrocious criminal conduct committed by Horsley and Baldwin to their youthful, innocent victim, which carried them out of the state in which it commenced, through two other states and far into the State of Alabama, that lasted for about forty-eight hours, gives rise perhaps to many questions, not material here, as to jurisdiction and venue of whatever crime was committed in each of the states, in each county of each state, through which they passed. The

same quantitative remoteness gives color to the point made by appellant, that the aggravated crime denounced by the death penalty act of Alabama was not committed in Monroe County, Alabama.

Neither party has cited a controlling authority on the point. In Alabama, at least, the case is one of first impression. Bizarreries have few precedents. Notwithstanding the paucity thereof, we are of the opinion that a qualitative analysis of the brimful quantity of the criminal behavior of appellant and his companion toward their victim and adherence to firmly established principles of law require a determination that the capital crime announced by the death penalty statute and changed in the indictment was committed in Monroe County, Alabama.

The eminent and profound Joel Bishop had this to say little less than a century ago:

> "Since the same wrong may under various circumstances be detrimental to two or more governments, each having a jurisdiction of it within principles before stated, any one of the governments may punish so much thereof as it deems disturbing to its interest or peace, but will not take any account of the disturbance to or rights of another government. Whether more governments than one will punish the wrong is a question for another connection, but a mere liability to punishment abroad is no bar to a prosecution at home."
>
> Bishop, Crim. Law, § 136 (9th Ed. 1923)

Although addressed to the subject of the particular crime of larceny, the same author stated what could be well said as to the crime or crimes involved here:

> "... The proposition that a man is to escape punishment for the violation of our laws because he first violated those of a foreign country, is absurd in itself, and mischievous in its practical application...."
>
> Bishop, Crim. Law, § 140 (9th Ed. 1923)

In Brill, Cyclopedia Criminal Law, § 287 (1922), we find:

> "But where an act is made up of a series of events, and is criminal in its result, all the occurrences need not have been done in the jurisdiction where it is sought to be punished, but it is enough if the result constitutes an offense under its law...."
>
> "A person, who in one state does an act which takes effect in another state, may be punished in the latter state, and a person who commits a crime in one state for which he may be there punished, is liable for its continuous operation in another state."

For more than a century, the legislature of Alabama has recognized the proposition that a crime does not have to be committed wholly within Alabama for it to be cognizable and punishable here and has gone further by declaring that the offender can be punished in Alabama even though he was out of the state at the time of the commission of the offense charged but consummated it in this state through the intervention of an agent, or by any other means proceeding directly from himself. In every Code of Alabama since 1852 are found provisions substantially as follows:

> "When the commission of an offense, commenced elsewhere, is consummated within the boundaries of this state, the offender is liable to punishment here, although he was out of the state at the commission of the offense charged, if he consummated it in this state through the intervention of an innocent or guilty agent, or by any other means proceeding directly from himself; and the jurisdiction in such case, unless otherwise provided by law, is in the county in which the offense was consummated."
>
> Title 15, § 92, Code of Ala. 1940
> [now § 15-2-4, Code of Ala. 1975]

In the light of the foregoing considerations and determination, it is not necessary for us to determine whether, as claimed by appellant, no robbery was committed in Alabama. Appellant is on strong ground in arguing that robbery was committed in North Carolina, as shown by Lambert v. State, supra.

There is nothing, however, in Lambert v. State, supra, to preclude the existence of the crime of robbery in more than one state where there is continuous felonious violence in more than one state, directed at the same victim in regard to the same property, or where all of the essential elements of the crime of robbery take place in more than one state. In Lambert, the question of venue was involved, and it was held that the prosecution was properly brought in the Dadeville Division of the Circuit Court of Tallapoosa County, which is on the east side of the Tallapoosa River in said county. The court did not hold that the case could not have been brought in the Alexander City Division, which is west of the Tallapoooosa River.

A likely opposite finding was suggested at least in Lambert by reference to the statutory provision that, when an offense is committed partly in one county and partly in another, venue in either county is proper. Code of Ala. 1940, Tit. 15, § 94. The court was content, as it should have been, to decide the questions before it and not to pursue ramifications that did not affect the merits of such questions.

The fact that a particular crime is completed does not always require the conclusion that the crime is then discontinued. Much depends upon the nature of the crime. It could hardly be said that the crime of assault and battery ends with the first of several blows landing on the victim. Even though the crime comes into existence as of the moment of the first blow, it is not to be maintained that a battery does not continue with each successive blow. If there is sufficient intermittency between blows after the first, additional batteries may be said to have occurred, but without such intermittency, succeeding blows constitute a continuation of the battery that came into existence with the first blow. The crime of rape is consummated by penetration, but continued penetration constitutes a continuation of the rape.

Asportation is necessary in robbery as it is in larceny, but, to prosecute for robbery, asportation does not have to be for any extended distance. Golston v. State, 57 Ala. App. 623, 330 So. 2d 446 (1975). Even though robbery becomes complete by the act of asportation, upon or after the application of force to the victim, it cannot with reason be said that the robbery is terminated as long as all of the essentials of the crime are active and effective without interruption.

> "...As was clearly set forth by the Circuit Court of Appeals in the Armour Packing Co. Case [153 F.1, 5, 6 (8th Cir.)]: 'A continuing offense is a continuous, unlawful act or series of acts set on foot by a single impulse and operated by an unintermittent force, however long a time it may occupy. Where such an act or series of acts runs through several jurisdictions, the offense is committed and cognizable in each....'"
>
> United States v. Midstate Horticultural Co., 306 U.S. 161, 166, 59 S. Ct. 412, 83 L. Ed. 563, 567 (1938).

Whatever the range of the demoniacal thoughts that surged through the sadistic minds of the defendants,,it appears that uppermost and continuously therein was the desire, as shown by their efforts, to separate the stolen automobile from the victim. The confession of appellant includes evidence of a search for an accessible part of a river into which they could throw her body and thereby force a permanent separation between her and the automobile. Their efforts in this respect were to some extent evinced by their traveling as close as possible along the west bank of the Alabama River and following its downward course from Montgomery to Camden. They never ceased their effort to separate the two, whether Naomi from the automobile or the automobile from Naomi --not even after they had stolen another motor vehicle at Camden. Even then, they continued their effort of asportation, to separate the one from the other, by their fiendish procedure in murdering her. Their effort to take permanently and indefinitely away from her the automobile was thwarted only by the automobile's sudden and unexpected immobility.

The crime of robbery is usually not a continuing offense, but the nature of it is such that it can, and does at times, continue beyond the point of time and place of its coming into existence as a full-fledged crime. As long as it can be correctly said that one is robbing another, that he continues, by force applied to the victim, to separate or attempt to separate the victim from the object of the robbery, the robbery, though complete as to the commission of all essential elements thereof, continues. The extended distance between Hudson, North Carolina, and Monroe County, Alabama, and the two days and nights between defendant's assault of Naomi and her death may obscure, but they do not destroy, the logical connection between the two: the unification of the crime of robbery and the crime of intentional homicide into the capital crime of which defendant was found guilty.

To accept appellant's view as applied to the facts herein would require a determination to the effect that under any pertinent provision of any death penalty statute of North Carolina, similar to the Alabama statute, the defendant could not be held guilty of intentionally killing Naomi in the process of a robbery of her if she had been killed by throwing her out of the autmobile ten minutes after defendant and Baldwin had seized possession of it by force exerted against the possessor.

The relationship between cause and effect is not determinable by boundary lines, whether state or county. The causal relation between the robbery and the killing is not logically affected by the state lines or county lines that were crossed.

A contention similar to appellant's contention, that the robbery was completed in North Carolina when the automobile was taken from the control of Naomi and therefore there was no robbery in Alabama,was rejected by the highest court of Kentucky in Tipton v. Commonwealth, Ky., 456 S.W.2d 681 (1970).

In that case, defendant and companion at gunpoint forced their way into victim's automobile which was stopped at a stop light in Campbell County; they there tied him up and put him in the back seat of the automobile, and one of them drove the automobile into Clark County in Kentucky. While in Clark County, they forced the victim to get out of the automobile and accompany them several hundred yards along a ravine where they tied him to a tree, pistol whipped him, took what money he had on him, and left him there. The court said:

> "The property of which the indictment charged that Hoskins had been robbed was the automobile. Tipton's contention is that the crime was completed in Campbell County when it was taken from his possession and control.
>
> ....
>
> "If the rightful owner's possession of stolen property is deemed to continue wherever it is carried by the thief, a fortiori it must be so when the victim himself is carried along with it. We have no doubt that the theft in this case continued into Clark County, and so did the element of armed force. Even, therefore, in the absence of Criminal Code § 21 the Clark Circuit Court would have had proper venue."

A similar conclusion was reached where jurisdiction, rather than venue, was involved, in Jordan v. United States, (D.C. App.), 350 A.2d 735 (1976). In that case, appellant and two fellow convicts escaped from confinement and commandeered an automobile in Virginia forcing its two occupants to accompany them into the District of Columbia where they were released. One of the occupants was robbed at knife point by the trio some time before she and her companion were set free. There was some question whether the robbery occurred in Virginia or in the District of Columbia. The court disregarded the boundary line in holding in accordance with what it had held in Carter v. United States, 96 U.S. App. D.C. 40, 223 F.2d 332 (1955), that the robbery continued into the District of Columbia even though the forcible taking had occurred in another state. It said:

> "But even accepting appellant's version of the facts as true, we are not persuaded that such a defense would preclude a conviction for robbery in the District of Columbia. It is undisputed that appellant did not part company with the victim of the robbery until after he and his confederates had driven well inside the District. During the period in which the robbers and victims were together in this city, appellant and his companions retained possession of the money only through threat of force. It was not until the original occupants of the automobile were dropped off that appellant and his friends made their getaway with the money seized in the robbery.
>
> "Under the law of this jurisdiction, robbery takes on the characteristics of a continuing offense when there is a lapse of time between the taking and the safe escape of the robber with the proceeds. In Carter v. United States, 96 U.S. App. D.C. 40, 223 F.2d 332 (1955), there was evidence that the defendant committed a robbery and later killed a pursuing policeman a few blocks away. The defendant was acquitted of premeditated murder but convicted of felony-murder, i.e., a killing incidental to the perpetration of a felony. He argued on appeal that the conviction should be reversed because the robbery was completed when the murder occurred. The court rejected this contention, holding that the robbery was still in progress because the appellant had not yet secured the fruits of the crime when the policeman was shot.
>
> "Under this view, it necessarily follows that the execution of the robbery, even though the forcible taking had occurred in another state, was not finished until the robbers had accomplished by force of arms their getaway with the loot --an event which occurred in this jurisdiction."

We come to the conclusion that the facts amply justify the finding that defendant and his companion intentionally killed Naomi Rolon while robbing her of her mother's automobile in Monroe County, Alabama, without relying upon the well established continuing offense principle applicable to larceny, which is said to be based upon a "fiction" that every act of removal or change of possession by the thief constitutes a new taking and asportation. 21 Am. Jur. 2d, Criminal Law, § 392, page 410. Courts of some jurisdictions do not apply the principle where there has been a crossing of a boundary between states saying

that the principle is a common law principle applicable only to boundaries between counties. Doane v. Commonwealth, Va., 237 S.E.2d 797 (1977). In Alabama, venue is in either the county in which the property is stolen or in the county into which the stolen property is taken. Code 1940, Tit. 15, § 98. If the property is stolen elsewhere and brought into Alabama, venue is in the county into which the property is brought. Code 1940, Tit. 15, § 97. By Tit. 14, § 337, the person who fraudulently brings into this state any personal property which he knew was stolen elsewhere is punishable as if he had stolen it in this state.

Although our conclusion herein is not dependent upon the generally accepted view as to larceny, it appears that there is as much, if not more, logic in applying it to a robbery which necessarily includes a larceny if, as here, the force applied against the victim is continuously synchronous with the asportation. In that circumstance, the "fiction" evolves into a fact.

That there have been cases in which the "fiction" applicable to larceny has been held inapplicable to other offenses, such as burglary and robbery, is because the other offense retained its usual non-ambulatory nature. In burglary, the property burglarized is usually immovable. In robbery, the person robbed is usually left where he was robbed and not transported by the robbers. When he is transported and carried away by the robbers with the goods forcibly taken from him, the crime as a whole is as ambulatory as larceny. This is manifest in what was said by Chief Justice Brickell in Smith v. State, 55 Ala. 59 (1876) as follows:

> "The common law was inflexible, not only that a man should be tried, on a criminal accusation, by his peers, but that his triers should be of the vicinage--near the place where the offense was alleged to have been committed. The rule, if not gradually relaxed, was at least construed to be satisfied, if the trial was by a jury of good and lawful men of the county in which the offense was committed, or alleged to have been committed. An exception was early recognized, if the offense was in its nature continuous. A simple larceny furnished the most frequent example. The possession of the goods stolen by the thief was a larceny in every county into which he might carry them. The trespass, committed in the original taking, did not, in contemplation of law, divest the true owner of the possession; and every moment's continuance of the trespass and felony is, in legal consideration, a new caption and asportation.--1 Lead. Cr. Cases, 224.
>
> "The exception was, however, limited to simple larceny. If the original offense was compound, involving more than a simple caption and asportation, while the simple larceny was the subject of indictment in any county into which the thief carries the goods, the compound offense is indictable only in the county in which it was committed. 1 Lead. Cr. Cases, 225; 3 Greenl. Ev. § 152; 1 Bish. Cri. Pro. § 60. If, in the course of a robbery, larceny is committed, the offender could be convicted of the latter, not of the former offense, in any county into which he might carry the goods. So, if the offense is aggravated, because of the place of its commission, as in a store, or other house, the security of which is intended to be protected; of the aggravated offense, the offender is indictable in the county in which it was committed, and not in another county to which the goods may be carried. The offense committed in the latter county is the unlawful caption and asportation, not accompanied with an invasion of the security of a house within the protection of the law creating the compound offense.
>
> "The statute (R.C. § 3948) declaring, 'where property is stolen in one county, and carried into another, the jurisdiction is in either county,' is but an affirmation, not an enlargement of the common-law rule to which we have referred, and does not extend to compound offenses, like that imputed to the appellant. While he was indictable in Wilcox county for a felony, if he was guilty of there stealing goods from a ware-house, exceeding in value fifty dollars, he was only guilty of petit larceny, a misdemeanor, if the value of the goods was less than one hundred dollars, in Dallas county, to which he carried them. The felony was not ambulatory, but, by force of the statute creating it, locality is of its essence."

We are deeply mindful of the principle that criminal statutes are to be strictly construed, but adherence to strict construction does not require an unreasonable interpretation, an interpretation that the legislature could not have intended. It could not have intended that a robbery commencing at Lanett, Alabama, and continued to a mile from the eastern boundary of

Alabama, where the victim of the robbery was killed, could be punished under the Death Penalty and Life Imprisonment Without Parole Statute of Alabama, but that one could escape punishment under such statute if he commenced the robbery of a person in West Point, Georgia, crossed the Chattahoochee with the victim, and killed her in Lanett, Alabama. The legislature in enacting a law designed to cover the most atrocious crimes conceivable did not intend to provide a crime shelter for interstate criminals.

Prior to the introduction into evidence of the confession by the defendant of all the material facts that occurred from the time he and his companion seized the automobile in North Carolina and killed Naomi in Monroe County, Alabama, there was ample testimony, apart from any admission by him, of the corpus delicti. His confessions or admissions consisted chiefly of a cassette tape of a conversation between him and two officers, which tape was played to the jury and admitted in evidence, and a writing signed by him as to the essential details, which also was admitted in evidence. The testimony that constituted evidence of the corpus delicti apart from any confessions or admissions was that of witnesses as to what they actually observed. It was shown by these witnesses that the North Carolina automobile and the slain body of Naomi had been found, the keys to the automobile had been found upon defendant's companion when they were stopped at Lanett, Alabama, in the truck that had been stolen at Camden, and that the North Carolina automobile tag that had been taken from the automobile was in the truck in which the two were riding. This went far beyond the requirement of proof of the corpus delicti. That requirement is met when there is evidence that a certain result has been produced and that some person is criminally responsible for the conduct that produced it. Burt v. State, 259 Ala. 618, 68 So. 2d 53 (1953); Langham v. State, 243 Ala. 564, 11 So. 2d 131 (1942); Price v. State, 51 Ala. App. 21, 288 So. 2d 803 (1974); Hearns v. State, 47 Ala. App. 725,

261 So. 2d 64 (1972). The corpus delicti should be proved before the confession is admitted in evidence, but the court may justifiably vary the order of the presentation of the evidence in that respect. McDowell v. State, 238 Ala. 101, 189 So. 183 (1939); Davenport v. State, 53 Ala. App. 326, 299 So. 2d 767, cert. denied, 293 Ala. 751, 299 So. 2d 771 (1974); Trimble v. State, 40 Ala. App. 354, 114 So. 2d 164 (1959).

Notwithstanding the testimony by defendant, at his election out of the presence of the jury, denying that he had signed the written statement introduced in evidence and claiming abuse by officers that would, if true, preclude the admission in evidence of any confession or incriminating statement by him, the evidence is overwhelmingly to the effect that he was not abused or mistreated in any respect, that he was fully advised of his rights, including his right to remain silent and his right to counsel, that he voluntarily and understandingly waived such rights, and that he voluntarily and understandingly made the confession and admissions attributed to him, including particularly the written statement signed by him and the conversation shown by the cassette tape. We have listened to the replay of the tape, which to us bears all indicia of voluntariness, responsibleness and understanding of defendant, and trustworthiness of the incriminating material.

Although the evidence shows that Baldwin, instead of appellant, actually struck the fatal blow, it shows that appellant was an active participant in all of the criminal conduct involved including the robbery and the intentional killing of Naomi. A finding that appellant was guilty of the crime charged in the indictment is justified without reliance to any extent upon the felony-murder doctrine. They factually intended to kill her as they did. The verdict and judgment is not in contravention of the provision of the death penalty

statute that "evidence of intent under this section shall not be supplied by the felony-murder doctrine." We so held after remandment in Ritter v. State, (1 Div. 837), supra.

Our review includes a review of the action of the trial court in setting and conducting the hearing and making a determination as to what punishment should be imposed after receiving the verdict of the jury, all as provided by § 13-11-4 of the Death Penalty and Life Imprisonment Statute. The trial court fully complied with the cited section, and its findings and sentence are fully supported by the evidence. A final determination in the sentence imposed did not go beyond the limits of the judicial discretion vested in the trial court. We do not find sufficient mitigating circumstances or such a lack of aggravating circumstances as to justify an interference with the final judgment and sentence of the trial court.

After the jury returned a guilty verdict and fixed punishment at death, the trial court set a hearing for presentation of aggravating and mitigating circumstances pursuant to the capital felony statute. At that hearing, the State only reintroduced the tape recording of the appellant's confession. The trial court then allowed the appellant to put on any evidence of mitigating circumstances he desired.

The appellant called his mother as a witness who testified concerning his childhood and his family history. She said he went to school, played basketball, and made average grades at school to or through the tenth grade, at which time a robbery occurred for which he was convicted and was serving time and escaped just before the crime here involved. She stated that when he was approximately four years of age, he fell from a two story building and was knocked unconscious for a month. She stated that he sometimes had spasms. The appellant likewise called his grandmother as a witness who testified to substantially the same facts as his mother had. She testified that the appellant had never known his father who had died before he was born. The appellant likewise took the stand in his own behalf and related his family history. He stated that

he was raised without a father in the family and that his older brother was the male head of the household. When he was asked several questions concerning the crime in question, he refused to answer.

At the end of the appellant's testimony, the following occurred:

> "THE COURT: Edward, this is your day in court to tell me what you have in your own behalf in the way of mitigating the sentence that has been imposed on you and I want to give you an opportunity to tell me whatever you feel like will help you in this regard. Do you want to tell me anything else other than what you've been asked about?
>
> * * * *
>
> "THE DEFENDANT, EDWARD HORSLEY: Yeah, I feel like all my life I've been put down because people said that I had a mental problem and everything. I was in a joint there one time and nobody ever wanted to give me an opportunity to speak for myself or nothing — everybody else always wanted to speak for me. I don't think I should get no electric chair because I don't deserve the electric chair. That's all."

After the hearing on aggravating and mitigating circumstances, the court made the following findings for the record:

> "Well, the question of your guilt or innocence has been referred to a jury in accordance with the law of this state and the jury has returned a verdict of guilty in your case and has set your sentence at death by electrocution. It is my duty to pronounce judgment upon that sentence and it is my duty to pronounce that you are, in fact, guilty of the crime of robbery with the aggravated circumstances of intentionally killing the victim. The Court, having conducted a hearing pursuant to Title 15, § 342(6) of the 1940 Code of Alabama, as amended, to determine whether or not the Court would sentence Edward Horsley to death or to life imprisonment without parole and the Court having considered the evidence presented at the trial and at said sentence hearing, the Court makes the following findings of fact: The Court first considered the aggravating circumstances as set out in Title 15, Section 342(8) of the 1940 Code of Alabama, as amended:
>
> "(a) The Court finds that the capital felony of robbery in the course of which the victim was intentionally killed was committed by the defendant while he was under sentence of imprisonment in the

state of North Carolina but from which he had escaped.

"(b) The Court further finds that the defendant was under sentence of conviction in the state of North Carolina involving robbery, in the course of which a police officer was shot.

"(c) The Court further finds that the capital felony was committed while the defendant was in the commission of robbery or flight after committing said crime of robbery.

"(d) The Court further finds that under the circumstances of this case as revealed by the record, the capital felony was especially heinous or atrocious or cruel.

"The Court now considers mitigating circumstances as described in Title 15, Section 342(9) of the 1940 Code of Alabama, as amended:

"(a) The court finds the only mitigating circumstance would be the age of the defendant at the time of the commission of the crime, to-wit, nineteen.

"The Court having considered the aggravating circumstances and the mitigating circumstances and after weighing the aggravating and mitigating circumstances, it is the judgment of the Court that the aggravating circumstances far outweigh the mitigating circumstances and that the death penalty as fixed by the jury should be and is hereby accepted."

The trial court then sentenced the appellant to suffer death by electrocution as prescribed by law.

We have reviewed the aggravating and mitigating circumstances set out in the record and the trial court's findings relative to those circumstances. The appellant was given an opportunity to present any mitigating circumstances he desired. Alabama's capital felony act, supra, fully comports with Lockett v. Ohio, ___ U.S. ___, 46 U.S.L.W. 4981 [Ms. July 3, 1978], in that it does not preclude from consideration as a mitigating factor "any aspect of a defendant's character and record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence of less than death." After review of the hearing on aggravating and mitigating circumstances, we find no error on the part of the trial court in reaching the conclusion that the aggravating circumstances outweigh the mitigating circumstances in this

case and that the death penalty should be imposed.

We have passed upon all questions raised by the appellant on appeal. In addition, we have searched the record for any error prejudicial to defendant and have found none. The judgment of the trial court should be affirmed.

The foregoing opinion was prepared by Retired Circuit Judge Leigh M. Clark, serving as a judge of this court under the provisions of § 6.10 of the New Judicial Article (Constitutional Amendment No. 328). His opinion is hereby adopted as that of the court. The judgment below is hereby

AFFIRMED.

CHAPTER 11.

DEATH PENALTY AND LIFE IMPRISONMENT WITHOUT PAROLE.

Cross references. — As to bail for persons charged with capital offenses, see § 15-13-3. As to mental examination of defendants in capital cases, see § 15-16-22. As to suspension of death sentence upon finding of insanity after conviction and sentence, see § 15-16-23. For additional provisions as to death penalty, see § 15-18-80 et seq. As to pardon or parole of person having death sentence commuted to life imprisonment, see § 15-22-27.

Sec.

13-11-1. Limitation on imposition of death penalty or life sentence without parole.
13-11-2. Aggravated offenses for which death penalty to be imposed; felony-murder doctrine not to be used to supply intent; discharge of defendant upon finding of not guilty; mistrials; reindictment after mistrial.
13-11-3. Hearing as to imposition of death penalty or life sentence without parole after conviction; admissibility of evidence; right of state and defendants to present arguments.
13-11-4. Determination of sentence by court; court not bound by punishment fixed by jury.
13-11-5. Conviction and sentence of death subject to automatic review.
13-11-6. Aggravating circumstances.
13-11-7. Mitigating circumstances.
13-11-8. Appointment of experienced counsel for indigent defendants.
13-11-9. Effective date.

§ 13-11-1. Limitation on imposition of death penalty or life sentence without parole.

Except in cases enumerated and described in section 13-11-2, neither a court nor a jury shall fix the punishment for the commission of treason, felony or other offenses at death, and the death penalty or a life sentence without parole shall be fixed as punishment only in the cases and in the manner herein enumerated and described in section 13-11-2. In all cases where no aggravated circumstances enumerated in section 13-11-2 are expressly averred in the indictment, the trial shall proceed as now provided by law, except that the death penalty or life imprisonment without parole shall not be given, and the indictment shall include all lesser offenses. (Acts 1975, No. 213, § 1.)

§ 13-11-2. Aggravated offenses for which death penalty to be imposed; felony-murder doctrine not to be used to supply intent; discharge of defendant upon finding of not guilty; mistrials; reindictment after mistrial.

(a) If the jury finds the defendant guilty, it shall fix the punishment at death when the defendant is charged by indictment with any of the following offenses and with aggravation, which must also be averred in the indictment, and which offenses so charged with said aggravation shall not include any lesser offenses:

(1) Kidnapping for ransom or attempts thereof, when the victim is intentionally killed by the defendant;

(2) Robbery or attempts thereof when the victim is intentionally killed by the defendant;

(3) Rape when the victim is intentionally killed by the defendant; carnal

5a

knowledge of a girl under 12 years of age, or abuse of such girl in an attempt to have carnal knowledge, when the victim is intentionally killed by the defendant;

(4) Nighttime burglary of an occupied dwelling when any of the occupants is intentionally killed by the defendant;

(5) The murder of any police officer, sheriff, deputy, state trooper or peace officer of any kind, or prison or jail guard while such prison or jail guard is on duty or because of some official or job-related act or performance of such officer or guard;

(6) Any murder committed while the defendant is under sentence of life imprisonment;

(7) Murder in the first degree when the killing was done for a pecuniary or other valuable consideration or pursuant to a contract or for hire;

(8) Indecent molestation of, or an attempt to indecently molest, a child under the age of 16 years, when the child victim is intentionally killed by the defendant;

(9) Willful setting off or exploding dynamite or other explosive under circumstances now punishable by section 13-2-60 or 13-2-61, when a person is intentionally killed by the defendant because of said explosion;

(10) Murder in the first degree wherein two or more human beings are intentionally killed by the defendant by one or a series of acts;

(11) Murder in the first degree where the victim is a public official or public figure and the murder stems from or is caused by or related to his official position, acts or capacity;

(12) Murder in the first degree committed while the defendant is engaged or participating in the act of unlawfully assuming control of any aircraft by use of threats or force with intent to obtain any valuable consideration for the release of said aircraft or any passenger or crewman thereon, or to direct the route or movement of said aircraft, or otherwise exert control over said aircraft;

(13) Any murder committed by a defendant who has been convicted of murder in the first or second degree in the 20 years preceding the crime; or

(14) Murder when perpetrated against any witness subpoenaed to testify at any preliminary hearing, trial or grand jury proceeding against the defendant who kills or procures the killing of witness, or when perpetrated against any human being while intending to kill such witness.

(b) Evidence of intent under this section shall not be supplied by the felony-murder doctrine.

(c) In such cases, if the jury finds the defendant not guilty, the defendant must be discharged. The court may enter a judgment of mistrial upon failure of the jury to agree on a verdict of guilty or not guilty or on the fixing of the penalty of death. After entry of a judgment of mistrial, the defendant may be tried again for the aggravated offense, or he may be reindicted for an offense wherein the indictment does not allege an aggravated circumstance. If the defendant is reindicted for an offense wherein the indictment does not allege an aggravated circumstance, the punishment upon conviction shall be as

heretofore or hereafter provided by law; however, the punishment shall not be death or life imprisonment without parole. (Acts 1975, No. 213, § 2.)

§ 13-11-3. Hearing as to imposition of death penalty or life sentence without parole after conviction; admissibility of evidence; right of state and defendants to present arguments.

If the jury finds the defendant guilty of one of the aggravated offenses listed in section 13-11-2 and fixes the punishment at death, the court shall thereupon hold a hearing to aid the court to determine whether or not the court will sentence the defendant to death or to life imprisonment without parole. In the hearing, evidence may be presented as to any matter that the court deems relevant to sentence and shall include any matters relating to any of the aggravating or mitigating circumstances enumerated in sections 13-11-6 and 13-11-7. Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements; provided further, that this section shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the state of Alabama. The state and the defendant, or his counsel, shall be permitted to present argument for or against the sentence of death. (Acts 1975, No. 213, § 3.)

§ 13-11-4. Determination of sentence by court; court not bound by punishment fixed by jury.

Notwithstanding the fixing of the punishment at death by the jury, the court, after weighing the aggravating and mitigating circumstances, may refuse to accept the death penalty as fixed by the jury and sentence the defendant to life imprisonment without parole, which shall be served without parole; or the court, after weighing the aggravating and mitigating circumstances, and the fixing of the punishment at death by the jury, may accordingly sentence the defendant to death. If the court imposes a sentence of death, it shall set forth in writing, as the basis for the sentence of death, findings of fact from the trial and the sentence hearing, which shall at least include the following:

(1) One or more of the aggravating circumstances enumerated in section 13-11-6, which it finds exists in the case and which it finds sufficient to support the sentence of death; and

(2) Any of the mitigating circumstances enumerated in section 13-11-7 which it finds insufficient to outweigh the aggravating circumstances. (Acts 1975, No. 213, § 4.)

§ 13-11-5. Conviction and sentence of death subject to automatic review.

The judgment of conviction and sentence of death shall be subject to automatic review as now required by law. (Acts 1975, No. 213, § 5.)

Cross references.—As to automatic appeal from death sentence generally, see § 12-22-150. As to affirmation of judgment of court in capital cases, see § 12-22-243.

§ 13-11-6. Aggravating circumstances.

Aggravating circumstances shall be the following:

(1) The capital felony was committed by a person under sentence of imprisonment;

(2) The defendant was previously convicted of another capital felony or a felony involving the use or threat of violence to the person;

(3) The defendant knowingly created a great risk of death to many persons;

(4) The capital felony was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit, rape, robbery, burglary or kidnapping for ransom;

(5) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;

(6) The capital felony was committed for pecuniary gain;

(7) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws; or

(8) The capital felony was especially heinous, atrocious or cruel. (Acts 1975, No. 213, § 6.)

§ 13-11-7. Mitigating circumstances.

Mitigating circumstances shall be the following:

(1) The defendant has no significant history of prior criminal activity;

(2) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(3) The victim was a participant in the defendant's conduct or consented to the act;

(4) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor;

(5) The defendant acted under extreme duress or under the substantial domination of another person;

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; and

(7) The age of the defendant at the time of the crime. (Acts 1975, No. 213, § 7.)

§ 13-11-8. Appointment of experienced counsel for indigent defendants.

Each person indicted for an offense punishable under the provision of this chapter who is not able to afford legal counsel must be provided with court appointed counsel having no less than five years' prior experience in the active practice of criminal law. (Acts 1975, No. 213, § 8.)

Cross reference. — As to defense of indigents generally, see § 15-12-1 et seq.

§ 13-11-9. Effective date.

This chapter shall become effective on March 7, 1976. (Acts 1975, No. 213, § 10.)

Supreme Court, U. S.
FILED
NOV 13 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-5458

EDWARD HORSLEY,

PETITIONER

-VS-

STATE OF ALABAMA,

RESPONDENT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

CHARLES A. GRADDICK
Alabama Attorney General

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Assistant Alabama Attorney General

JEAN WILLIAMS BROWN
Assistant Alabama Attorney General

ATTORNEYS FOR RESPONDENT

INDEX

	Page
TABLE OF CASES	ii
QUESTIONS PRESENTED	1
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED	3
STATUTES INVOLVED	3
STATEMENT OF THE CASE	4
SUMMARY OF THE ARGUMENT	4
ARGUMENT	
I. The Alabama Death Penalty Statute Which Precludes Juries From Considering Lesser Included Offenses Does Not Result In A Violation of the Eighth & Fourteenth Amendments	5
II. Alabama's Procedure of Deferring The Trial Judge's Consideration of Aggravating And Mitigating Circumstances Until After The Jury Has Imposed the Death Sentence is Not Violative of the Eighth and Fourteenth Amendments	8
III. The Alabama Death Penalty Statute Permits Consideration Of Non-Statutory Mitigating Circumstances	10
IV. The State Of Alabama Had Jurisdiction To Try Petitioner For Aggravated Robbery	16
CONCLUSION	17
CERTIFICATE OF SERVICE	18

TABLE OF CASES

	Page
Baldwin v. State, Ala. Cr. App., 372 So. 2d 26 (1978), Ala., 372 So. 2d 32 (1979)	15
Brown v. Ohio, 432 U.S. 161 (1977)	15
Ex Parte: Recardo Cook, Ala., 369 So. 2d 1251 (1978)	14,15
Furman v. Georgia, 408 U.S. 238 (1972)	5,6
Garner v. Louisiana, 368 U.S. 157 (1961)	15
Edward Horsley v. State, ___So. 2d___ (Ala. Cr. App. October 3, 1978), Ala., ___So. 2d ___ (1979) Ms. Op. at 22	16
Jacobs v. Alabama, Ala., 361 So. 2d 640 (1978)	9,13,14
Jurek v. Texas, 428 U.S. 262, 96 S. Ct. 2950, 49 L. Ed. 2d 929 (1976)	5
Lockett v. Ohio, ___U.S.___, 98 S. Ct. 2954 (1978)	5,10,12,13,14
Willie Lewis Mack v. State, ___So. 2d ___, (Ala. Cr. App. July 25, 1978) Ms. Op. at 46	15
Neal v. State, Ala. Cr. App., 372 So. 2d 1331 (1979)	16
Proffitt v. Florida, 428 U.S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976)	5,11,12

TABLE OF CASES (CONTINUED)

Page

Herbert Lee Richardson v. State,
___So. 2d ___ (Ala. Cr. App., October 3, 1978).....15

Roberts v. Louisiana,
428 U.S. 325 (1976).....6

Woodson v. North Carolina,
428 U.S. 280 (1976).....7

OTHER STATUTES

Code of Alabama 1975, §13-11-1 et seq.....3,4,5,7, 11,12,13

Code of Alabama 1975, §15-2-4.....3,17

28 U.S.C. §1247(3).....2

QUESTIONS PRESENTED

I.

WHETHER THE ALABAMA DEATH PENALTY STATUTE WHICH PRECLUDES JURIES FROM CONSIDERING LESSER INCLUDED OFFENSES RESULTS IN A VIOLATION OF THE EIGHTH & FOURTEENTH AMENDMENTS.

II.

WHETHER ALABAMA'S PROCEDURE OF DEFERRING THE TRIAL JUDGE'S CONSIDERATION OF AGGRAVATING AND MITIGATING CIRCUMSTANCES UNTIL AFTER THE JURY HAS IMPOSED THE DEATH SENTENCE IS VIOLATIVE OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

III.

WHETHER THE ALABAMA DEATH PENALTY STATUTE PERMITS CONSIDERATION OF NON-STATUTORY MITIGATING CIRCUMSTANCES.

IV.

WHETHER THE STATE OF ALABAMA HAD JURISDICTION TO TRY PETITIONER FOR AGGRAVATED ROBBERY.

IN THE SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM,1979

NO._____

EDWARD HORSLEY,

PETITIONER

-VS-

STATE OF ALABAMA,

RESPONDENT

BRIEF AND ARGUMENT IN OPPOSITION
TO PETITION FOR WRIT OF
CERTIORARI

BRIEF AND ARGUMENT OF RESPONDENT

OPINIONS BELOW

The opinion of the Alabama Court of Criminal Appeals affirming the petitioner's conviction and sentence has not yet been reported. The opinion of the Supreme Court of Alabama affirming the conviction and sentence and the denial of rehearing also have not been reported.

JURISDICTION

The Petitioner invokes jurisdiction pursuant to 28 U.S.C. §1247(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States.

STATUTES INVOLVED

Code of Alabama 1975, §13-11-1 et seq.

Code of Alabama 1975, § 15-2-4

STATEMENT OF THE CASE

Petitioner, Edward Horsley, was indicted under Code of Alabama 1975, §13-11-2(a)(2) for the capital offense of "robbery...when the victim is intentionally killed..."

Petitioner's trial began on November 14, 1977. On November 15, 1977 the jury returned a verdict of guilty as charged in the indictment.

Petitioner's conviction and sentence were affirmed by the Alabama Court of Criminal Appeals on October 3, 1978. That court denied Petitioner's Application for Rehearing on October 31, 1978.

The Supreme Court of Alabama affirmed Petitioner's conviction and sentence on June 1, 1979. That court denied Petitioner's Application for Rehearing on July 6, 1979.

SUMMARY OF THE ARGUMENT

The Alabama death penalty statute does not permit a jury to return a guilty verdict for a lesser included offense and in that way effectively prevents the infrequent and arbitrary imposition of the death sentence which the Constitution forbids.

The Alabama statute's provision for deferring the trial judge's consideration of aggravating and mitigating circumstances until after the jury has imposed the death sentence is not violative of the Eighth and Fourteenth Amendments.

Moreover, the Alabama statute allows the judge, as sentencing authority to consider at the sentencing hearing any evidence which tends to show that the death penalty is not appropriate in a given case. The Alabama Supreme Court has

interpreted the statute to allow the sentencing judge to hear the broadest possible range of evidence and argument in mitigation. This interpretation is authoritative and satisfies the requirements of Lockett v. Ohio, Proffitt v. Florida, and Jurek v. Texas.

Finally, venue and jurisdiction to try Petitioner lay in Alabama.

ARGUMENT

I.

THE ALABAMA DEATH PENALTY STATUTE WHICH PRECLUDES JURIES FROM CONSIDERING LESSER INCLUDED OFFENSES DOES NOT RESULT IN A VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

Under the Alabama death penalty statute's carefully drafted definitions of capital crimes there are no lesser included offenses. Code of Alabama 1975, §13-11-2(a). While this Court has not held in post-Furman cases that the preclusion of lesser included offenses is constitutionally required, it does not follow that such preclusion is an unconstitutional method of seeking to obtain the type of sentencing which various members of the Court felt important in Furman.

In Furman, the way in which death penalty statutes had been applied in the past was held to be unconstitutional, because that application was "pregnant with discrimination" 408 U.S. at 257 (Justice Douglas, concurring); permitted the death penalty to be "wantonly" and "freakishly" imposed, 408 U.S. at 310 (Justice Stewart, concurring); and resulted in the death penalty being imposed with "great infrequency" and afforded "no meaningful basis for distinguishing the

few cases in which it [was] imposed from the many cases in which it [was] not", 408 U.S. at 313 (Justice White, concurring). The preclusion of lesser included offenses is the most effective means of ensuring that de facto jury discretion does not make the operation of a death penalty statute "pregnant with discrimination" because it is imposed with such "great infrequency" as to be "wantonly" and "freakishly" imposed. Because of this, preclusion of lesser included offenses avoids the pitfalls denounced in Furman and thereby promotes sentencing that is consistent with the Constitution.

Furthermore, no capital punishment system which permits a jury to return a conviction on a lesser included offense in a capital case will ever attain the full advantage of judicial sentencing. As long as the jury has the easy de facto discretion which the availability of lesser included offenses provides, the greater consistency of judicial sentencing will be undermined. See Roberts v. Louisiana, 428 U.S. 325, 335 (1976) (plurality opinion).

Moreover, any capital sentencing scheme in which jurors are tempted by the availability of lesser included offenses merely ignores the problem of de facto jury discretion.

In his brief petitioner speculates that the preclusion of lesser included offenses might cause juries to convict a defendant of a capital offense when that defendant was merely guilty of a lesser offense which should have been but was not included. Such speculation is unpersuasive for three reasons. First of all, there is absolutely no indication or evidence that such cold-hearted irresponsibility has ever occurred or will ever occur.

The second reason why petitioner's argument is unpersuasive is that historical experience directly contradicts it. The available evidence indicates that because of compassion, juries

tend, if anything, to resolve such questions in favor of the accused. The jury nullification data relied upon to strike down mandatory death penalty sentences in Woodson v. North Carolina, 428 U.S. 280, 289-293 (plurality opinion), demonstrates the extent to which juries will go to spare defendants from capital punishment. In the face of such evidence, petitioner's argument that jurors would callously elect to send to his death a man whom they concluded was not guilty of a capital offense is without any support.

The third reason why petitioner's argument is unpersuasive is that it incompletely states the facts. If the jury finds that a defendant is guilty of some offense other than the capital offense charged, the jury is not faced with what petitioner calls the "Hobson's choice" of acquitting a criminal or of returning a verdict sentencing a man to death for a capital offense of which he is not guilty. Instead, the Alabama statutes specifically provide that the jury can refuse to agree on a verdict or on the sentence of death and thereby cause a mistrial. Code of Alabama 1975, §13-11-2(c). In his brief, petitioner omits all mention of this important safety-valve the existence of which totally destroys his "Hobson's choice" argument.

Hence, the inclusion of lesser included offenses in a capital sentencing system is not constitutionally required. Preclusion of lesser included offenses serves important constitutional goals, and there is no evidence whatsoever that it will result in the conviction of a defendant who is not guilty of a capital offense. All of the historical evidence concerning the behavior of juries in capital cases is to the contrary. In any event, the Alabama statutory system contains an important safety-valve in that a mistrial can be declared if a jury is unable to agree on a verdict or on the sentence of death. After such a mistrial, the defendant can be retried for the capital offense or he can be reindicted for a non-capital offense.

Finally, while this Court has granted a petition for a writ of certiorari on this very issue, the issue has been limited to cases where the evidence would have supported a verdict of guilt of a lesser included non-capital case.

However, at no point in his argument does Petitioner contend that the evidence in his case would have supported a verdict of guilt of a lesser included offense.

Hence, the petition for a writ of certiorari should not be granted on this issue.

II.

ALABAMA'S PROCEDURE OF DEFERRING THE TRIAL JUDGE'S CONSIDERATION OF AGGRAVATING AND MITIGATING CIRCUMSTANCES UNTIL AFTER THE JURY HAS IMPOSED THE DEATH SENTENCE IS NOT VIOLATIVE OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

Petitioner contends that the Alabama death penalty statute is unconstitutional in that it places the trial judge in the position of having to override the jury's death sentence, thus subjecting him to the brunt of public outcry should he decide the death penalty to be inappropriate.

However, while Petitioner states that such a procedure is fraught with peril, he offers no concrete empirical evidence to support this conclusion.

Moreover, there is absolutely no indication or evidence that any trial judge has left a death sentence intact in a case where life imprisonment without parole was warranted. To the contrary, the trial judge is statutorily required to weigh the aggravating and mitigating circumstances and if the court upholds the death sentence, the judge must list the aggravating circumstances which support the sentence and any mitigating circumstances which are insufficient to outweigh the aggravating circumstances. Hence, this procedure eliminates a sentence founded on fear or popular opinion.

Furthermore, historical experience directly contradicts the fear that trial judges will not perform their statutory

duty. See Jacobs v. Alabama, Ala., 361 So. 2d at 654, where the majority opinion of the Alabama Supreme Court stated:

> In his original dissent, Mr. Justice Jones states: "The majority's judicial review 'cure all' obtains even less credence when it is understood that such guided discretion is placed upon a popularly-elected official." He supports his conclusion dehors the record by citing an example in footnote 3 of his dissent, and states that public comment or clamor will influence trial judges to ignore mitigating circumstances. We hesitate to go outside the record to answer Mr. Justice Jones' conclusion, but we feel constrained to do so, since he infers that elected judges will not do their sworn duty, and will be unduly swayed by public pressure. Since Mr. Justice Jones made his observation, we have been informed that the same trial judge who conducted the trial in the case mentioned by Justice Jones has again sentenced a defendant to life without parole. State v. Eddie Bernard Neal, #78-00693, decided August 7, 1978, 10th Judicial Circuit. We are also informed that a jury in Covington County acquitted a defendant charged under the capital felony statute. State v. David Bonner, #CC 7825, decided April 19, 1978, 22nd Judicial Circuit. Consequently, any suggestion that either judges or jurors will fail to do their sworn duty because of public comment or clamor should not be entertained.

The fact that a trial judge, who was subjected to what Petitioner and Justice Jones perceived to be such an outcry of public criticism, later sentenced another defendant to life without parole indicates that trial court judges will not be unduly influenced by public opinion.

The sentencing decisions which trial court judges have made under Alabama's new capital punishment act further evidence that public pressure will not prevent judges from pronouncing non-capital sentences when they feel that the mitigating and aggravating circumstances in a particular case do not justify the death penalty. Under Alabama's new Death Penalty Act, over 45 sentence hearings have been held after a defendant pleaded not guilty and was convicted by a jury. In at least 8 of these cases, the trial judge has sentenced the defendant to life imprisonment without parole instead of to death. Hence, Petitioner's argument is without merit.

III

THE ALABAMA DEATH PENALTY STATUTE PERMITS CONSIDERATION OF NON-STATUTORY MITIGATING CIRCUMSTANCES.

In Lockett v. Ohio, 98 S. Ct. 2954, 2965 (1978), a plurality of the United States Supreme Court held that:

> ...we conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. (footnotes omitted).

A statutory system that permitted broad consideration of mitigating factors was deemed necessary because:

> ...a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. ...98 S. Ct. at 2965.

The opinion further stated that in order to meet constitutional requirements, a state death penalty must not preclude consideration of relevant mitigating factors. Lockett v. Ohio, 98 S. Ct. at 2967.

The Alabama statutory sentencing procedure in capital cases, as construed by the Alabama Supreme Court, does not run afoul of the requirements laid down by the plurality opinion in Lockett v. Ohio, supra. As required in that opinion, the Alabama sentencing procedure allows the sentencing authority to consider as a mitigating factor any aspect of a defendant's character or record, any of the circumstances of the offense, and any other relevant evidence in mitigation that the defendant proffers as a basis for a sentence less than death.

Under Alabama's death penalty act, if the jury finds the defendant guilty, the trial judge is required to hold a separate sentence hearing for the purpose of determining the appropriate punishment for that specific case. Code of Alabama 1975, §13-11-3. The statute states that the purpose of this sentence hearing is, "...to aid the court to determine whether or not the court will sentence the defendant to death or to life imprisonment without parole." At the sentence hearing, the sentencing authority is in no way precluded from hearing all evidence showing relevant mitigating factors, because the statute itself provides that: "In the hearing, evidence may be presented as to any matter that the court deems relevant to sentence and shall include any matters relating to any of the aggravating and mitigating circumstances enumerated in Sections 13-11-6 and 13-11-7." Code of Alabama 1975, §13-11-3 (emphasis added).

Alabama's death penalty statute further provides that any evidence which the trial court deems to have probative value may be received. Section 13-11-3. As the statutory language itself makes clear, the sentencing authority in Alabama is in no way precluded from considering as a mitigating factor any aspect of a defendant's character or record, any of the circumstances of the offense, or any other relevant evidence in mitigation that the defendant proffers as a basis for a sentence less than death.

The case of Proffitt v. Florida, 428 U.S. 242 (1976), likewise demonstrates the constitutionality of Alabama's sentencing provision. The Florida statutory provision, which was upheld in Proffitt, supra, Fla. Stat. Ann. §931.141(6)

entitled MITIGATING CIRCUMSTANCES, provides that "Mitigating circumstances shall be the following: ..."and then goes on to list seven statutory mitigating factors. The Alabama provision, Code of Alabama 1975, §13-11-7, entitled MITIGATING CIRCUMSTANCES, provides that, "Mitigating circumstances shall be the following: ..."and then goes on to list seven statutory mitigating factors. Not only is the introductory language in these two corresponding provisions identical, but the actual mitigating circumstances themselves in the Florida and Alabama statutes are verbatim identical.

In distinguishing the Florida statute which was upheld in Proffitt v. Florida, supra, from the Ohio statute which was struck down in Lockett v. Ohio, supra, the Lockett plurality observed:

> Although the Florida statute approved in Proffitt contained a list of mitigating factors, six members of this court assumed, in approving the statute, that the range of mitigating factors listed in the statute was not exclusive. ...98 S. Ct. at 2965-2966.

The essence of petitioner's argument in the present case is that that assumption cannot be made about Alabama's death penalty statute. Petitioner's argument is that in Alabama the sentencing authority can only consider those mitigating circumstances which are set out in Code of Alabama 1975, §13-11-7 in determining whether a sentence of death should be imposed on a particular defendant. Petitioner's argument is that since section 13-11-4 requires that the sentencing authority must weigh the mitigating circumstances which are enumerated in section 13-11-7, and since that section says that certain considerations "shall be" the mitigating circumstances, then the sentencing authority is limited in considering the mitigating factors.

Petitioner's argument ignores the provisions of section 13-11-3, which were quoted on page 11 of this brief, above. Even more importantly, petitioner's argument ignores the construction and interpretation which have been given the statutory provisions by the Alabama Supreme Court.

The construction and interpretation which have been given to the relevant statutory provisions by the Alabama Supreme Court make it clear that this Court need not depend upon any assumptions about the matter. No assumption is necessary, because the Alabama Supreme Court has explicitly ruled that the statutory mitigating factors set out in the Alabama death penalty statute are not exclusive.

Jacobs v. State, 361 So. 2d 640 (Ala. 1978), was the first case which the Alabama Supreme Court decided concerning the Alabama death penalty statute. After the Alabama Supreme Court had issued its opinion in that case, the United States Supreme Court handed down its decision in Lockett v. Ohio, 98 S. Ct. 2954 (1978). Jacobs then asked the Alabama Supreme Court to reconsider its decision in his case in light of the Lockett v. Ohio, supra, decision. In considering and denying Jacobs' application for a rehearing, the Alabama Supreme Court had an opportunity to interpret and construe the sentencing provisions of the Alabama death penalty statute in light of the United States Supreme Court holding in Lockett v. Ohio, supra. The Alabama Supreme Court extended its original opinion in Jacobs v. State, 361 So. 2d at 652-654, and in doing so held as follows:

> "We deny petitioner's application to rehear this case but we point out that we have examined the cases of Bell v. Ohio, ___ U.S. ___, 98 S. Ct. 2297, 57 L. Ed. 2d 1010 and Lockett v. Ohio, ___ U.S. ___, 98 S. Ct. 2954, 57 L. Ed. 2d 973, decided after petitioner's application for a rehearing was filed, and we conclude that those cases do not invalidate Alabama's sentencing scheme in death cases. Alabama's sentencing scheme specifically provides, in part:

> '...In the hearing, evidence may be presented as to any matter that the court deems relevant to sentence and it shall include any matters relating to any of the aggravating or mitigating circumstances enumerated in sections 13-11-6 and 13-11-7. ...(Emphasis added) (§ 13-11-3, Code, 1975).' "

The Alabama Supreme Court itself added the emphasis to that part of the statute. In view of that provision of the statute, the Alabama Supreme Court, on rehearing, concluded:

> It is readily apparant, therefore, that Alabama's sentencing scheme broadly allows the accused to present evidence of mitigating circumstances, and does not contain the deficiencies the court found were inherent in Ohio's scheme. (Emphasis in original.)

This interpretation and construction of the sentencing provisions in Alabama's death penalty statute were reaffirmed in Ex Parte: Recardo Cook, Ala., 369 So. 2d 1521 (1978). In Ex Parte: Recardo Cook, supra, the Alabama Supreme Court remanded the case to the trial court for another sentencing hearing, because the one which had been conducted did not comport with the requirements outlined in Lockett v. Ohio, supra, and Jacobs v. Alabama, supra. The Alabama Supreme Court recognized, based upon the plurality's opinion in Lockett the necessity of the sentencing authority considering any relevant aspect of a defendant's character or record and any of the circumstances of the offense the defendant proffers as a basis for a sentence less than death. In remanding for a new sentence hearing in Ex Parte: Recardo Cook, the Alabama Supreme Court stated:

> Lockett was not released until after this court upheld Alabama's Death Penalty Act in Jacobs v. State. Nevertheless, on rehearing in Jacobs we considered the possible impact of Lockett on Alabama's statute. In an extended opinion we noted that Lockett does not invalidate Alabama's sentencing scheme in death cases since §13-11-3, Code of Alabama 1975, specifically allows any relevant evidence in mitigation to be presented at the sentencing hearing....

Therefore, the Alabama Supreme Court has construed Alabama's sentencing scheme in capital cases to allow the sentencing authority to consider any relevant evidence in mitigation, and this complies with the holding in Lockett v. Ohio, supra.

Because the Alabama Supreme Court has interpreted Alabama's death penalty statute to permit consideration at the sentence hearing on non-statutory mitigating circumstances, that settles the matter. The Alabama Supreme Court and not petitioner is the authoritative source for the proper construction and interpretation of the Alabama death penalty statute. E.g., Brown v. Ohio, 432 U.S. 161 (1977); Garner v. Louisiana 368 U.S. 157 (1961).

Because the sentencing determination under Alabama's statute includes non-statutory mitigating circumstances, the Alabama Supreme Court has instructed trial court judges, who are the sentencing authorities, to have as much information about a defendant as possible. In Ex Parte: Recardo Cook, supra, the Alabama Supreme Court stated:

> In conducting these hearings trial judges should keep in mind their ability to order pre-sentence investigations and psychiatric evaluations to obtain a full picture of the defendant.

The Alabama Court of Criminal Appeals has gone even further. In remanding cases for new sentence hearings, that Court has twice required trial court judges to order a pre-sentence report to be made and considered. Willie Lewis Mack v. State, ___So. 2d __(Ala. Cr. App. July 24, 1978) Ms. Op. 46; Herbert Lee Richardson v. State, ___So. 2d__(Ala. Cr. App. October 3, 1978), Ms. Op. at 33.

Not only has the Alabama statute been interpreted by the Alabama appellate courts to allow consideration of non-statutory mitigating circumstances, but trial court judges have actually administered it in such a fashion. In Baldwin v. State, Ala. Cr. App., 372 So. 2d 26 (1978), Ala., 372 So. 2d 32 (1979), the Alabama Court of Criminal Appeals noted with approval that at the sentence hearing in that case, "The

appellant was given the opportunity to present any mitigating circumstances which he desired to the trial court." The Court noted the same thing in Edward Horsley v. State, ___So. 2d ___ (Ala. Cr. App. October 3, 1978) Ala., ___So. 2d___ (1979) Ms. Op. at 22.

Neal v. State, Ala. Cr. App., 372 So. 2d 1331 (1979), is a case in which the trial court judge not only considered a non-statutory mitigating circumstance but gave significant weight to it in sentencing the defendant to life without parole. After setting out some statutory mitigating factors he found to be present in the case, the trial court judge listed and considered the following non-statutory mitigating circumstance:

> While there was sufficient evidence for the jury to find Eddie Barnard Neal guilty, there was not the depth of evidence against him which this Court must insist upon for the penalty of death to be invoked.

In summary, the Alabama death penalty statute expressly permits a trial court judge to consider any matter that he deems relevant to sentencing. The statute, as interpreted by the Alabama Supreme Court, does not prohibit a trial court judge from considering non-statutory mitigating circumstances. The Alabama appellate courts have instructed trial court judges to consider any and all evidence that is relevant to mitigation of the crime. Trial court judges have given convicted defendants the opportunity to present any relevant evidence in mitigation.

IV.

THE STATE OF ALABAMA HAD JURISDICTION TO TRY PETITIONER FOR AGGRAVATED ROBBERY.

The Petitioner argues that the State of Alabama lacked jurisdiction to try him for aggravated robbery.

However, the Respondent submits that the Alabama Supreme Court was correct in its holding that the crime of robbery when the victim is intentionally killed is a single offense beginning with the act of robbing or attempting to rob and culminating with the act of intentionally killing the victim. While it is true that the offense consists of two elements, robbing and intentionally killing, it does not consist of two separate offenses. Thus, the offense was consummated when the victim was killed in Monroeville, Alabama.

Moreover, Code of Alabama 1975, 15-2-4 provides:

> When the commission of an offense commenced elsewhere is consummated within the boundaries of the State of Alabama, the offender is liable to punishment in Alabama, although he was out of the state at the commission of the offense charged if he consummated it in this State through the intervention of an innocent or guilty agent or by any other means proceeding directly from himself; and venue in such case is in the county in which the offense was consummated, unless otherwise provided by law.

Thus, by virtue of the aforementioned statute, clearly the trial court had jurisdiction to try appellant.

CONCLUSION

Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that I have served a copy of the foregoing on Hon. Russell, J. Drake, Drake & Pierce, 1509 University Blvd., Tuscaloosa, Alabama 35401 by placing same in the U.S. Mail, postage prepaid this 6th day of November, 1979.

JEAN WILLIAMS BROWN
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